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AUTHOR Vitullo-Martin, Thomas
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ABSTRACT

This study examined the delivery of Elementary and Secondary Education Act Title I services to private schools through an analysis of a national survey of Title I programs, an examination of the implementation of the program in 50 school districts and by the Bureau of Indian Affairs, and a review of the monitoring efforts of 41 state education agencies. The survey analysis showed that those served by the program received a fraction of the services given to public school students. The investigation of the 50 districts identified a number of practices that limited the quantity of private school students included in Title I programs, and the quality of services they received. It also found that the present approach has an impact on the organization of private schools, especially the centralization of their administration, school-teacher relations, and relationships between schools and parents. The report reviews the development of the current interpretation of the First Amendment, as it involves schools, and proposes an alternative approach that would avoid the entanglements of the public with the private experienced in the present program. It concludes by reviewing the approach taken to provide services in the Indian territories. (Author/MK)

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On the Comparability of Services Provided to
Private School Students Under Title I of the
Elementary and Secondary Education Act (as amended, 1974)
and on the Impact of the Act on Private Schools

A REPORT FOR THE EDUCATION EQUITY GROUP, COMPENSATORY
EDUCATION DIVISION OF THE NATIONAL INSTITUTE OF EDUCATION

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Introduction

DELIVERY OF TITLE I SERVICES TO CHILDREN ATTENDING NON-PUBLIC SCHOOLS

The paper prepared under this contract with the National Institute of Education is one of a series of reports on the operation of Title I. The purpose of the report is to identify areas of difficulty, and propose alternative means of implementing this program.

Title I of the Elementary and Secondary Education Act of 1965, as amended in 1974 (also known as the Compensatory Education Act), is broadly formulated to provide remedial educational services to children whose education is hindered by their environments. Public school districts, at their discretion, may ask to be considered "local education agencies" (LEAs) to administer Title I to all eligible children within their jurisdictions.

All children meeting standards (relative to the local community) for residence in low-income areas and low rates of scholastic progress are eligible for the program. Eligible children may attend public or private schools or various types of juvenile institutions. Their eligibility is not a function of the type of institution they attend. Allocations are made to states and qualifying sub-units by

a formula which considers each area's low-income school-age population, weighted by the count of children receiving supplemental aid. All children residing in an area are counted for purposes of establishing the allotment. The allotment is not determined by the public school registry or even by the register of all schools in the area. It includes non-public school students and children not attending school.

The child-benefit approach is fundamental to Title I. The law designates LEAs to deliver diagnostic and remedial educational services (to correct children's educational problems defined by the act) to children defined by the act as eligible. In most cases, public school districts become the LEAs under the act, but the Title I assistance is in no form general aid to a school district. Districts must apply for the funds available to their area by writing a specific proposal to provide identified services to identified pupils. The contract must be approved by the state education agency (SEA) as meeting the federal purposes under the act. State and federal auditors then hold the district accountable for fulfilling the contract. Districts may not accept Title I money and spend it on students or services not included in their contract, and they may not reduce their own educational efforts for the students participating

in the federal program.

In sum, students are entitled to receive educational services by Title I, and the act provides funds for the purchase of the services. The services are usually—but not necessarily—purchased from local public school districts. But the act specifically includes non-public school children every step of the way. They are counted in determining the proportion of low-income children living in the area and therefore in determining Title I allocation to each area. Under the act, children are entitled to receive Title I funds irrespective of the school system they come from. Attendance at any form of non-public school should not bias a student's chances of receiving the Title I services to which he is entitled.

An accurate statement of the law would be: Non-public school students should have the same opportunity to receive Title I services they would enjoy if they were attending public schools. And the intensity and quality of the services they receive should be equivalently proportionate to their needs.

Because Title I does not have sufficient funds to service all eligible students, the program has given discretion to local education authorities to select eligible children who will actually receive Title I services. The

disproportion in services delivered to public and private school students does not necessarily result from public school officials' biasing the program against private school students. Because eligibility and amount of services a student gets are based on the student's need, private school children may be given fewer and lower-quality services because they need less. One can only discover if there is bias in the distribution of services by first identifying the level of services given private and public school students and then examining how local education agency (LEA) officials select public and private school students for Title I services, how they assess the students' respective needs, and how they design and deliver educational programs to meet those needs. This study examined the national survey data describing the extent of private school students' inclusion in Title I, and then examined the manner of implementing the program in detail in 50 districts, and the monitoring activities of 41 state education agencies (SEAs) charged by the federal government with overseeing the inclusion of private school students in the program on an equitable basis.

While larger cities have a better record than small cities and rural areas, this study found practices which either unfairly eliminated private school students from the program or provided them with services or substantially

inferior quality, or both, in over half the large cities surveyed. The unfair practices included:

1. Inflating—and refusing to correct—the estimates of public school children eligible for the program. Some systems overestimated the public school eligibles by 30% without adjusting at the time services were delivered.
2. Providing poor supervisory and management services for the non-public portion of the program. One system did not begin its non-public school program until January of the school year.
3. Applying additional criteria to the eligibility requirements of the non-public school system. For internal budgeting purposes, one system counted as eligible only private school students on welfare.
4. Assigning less experienced teachers. Most systems assign their least experienced teachers to non-public school students, and they frequently assign teachers who work only part time.
5. Refusing to provide comparable services. Several systems provided public school participants with extensive diagnostic and prescriptive services in reading and math and bilingual services, but provided only educational materials and teacher aides to serve private school.

student needs.

In the most severe cases, systems would require private school students to travel to public school or neutral sites, but would refuse to provide transportation services, exposing the children to danger in inner-city areas and effectively refusing them services in rural areas.

Few systems actually identified eligible non-public school children by survey and testing. Even those which did frequently applied different standards to public and private school students. One city tested public school students at the end of the second grade (grade 2.8) and counted them eligible if they scored at grade 2.9 (i.e., if they scored above average for their system), but counted private school students as eligible only if they scored at grade 2.5. Frequently, especially in rural areas and on Indian reservations, public systems simply ignored private school student needs.

Federal courts have taken up the issue of on-site delivery of Title I services, and their decision could substantially alter the degree of bias experienced by private school students in the program. The preliminary results find off-site services to be delivered to smaller portions of the eligible non-public students, and to be of poorer academic quality.

We have presented throughout this discussion several suggestions for improvement of the program in its delivery of services to private school students. These suggestions must be cognizant both of the political origins of the ESEA, Title I program, and of the position of the Supreme Court on aid to private schools, which has shaped and continues to shape the program. Accordingly, we begin (Chapter 1) with a discussion of the political context of Title I as it affects private schools, and conclude (Chapter 7) with a discussion of the constitutional basis for the child-benefit approach embodied in Title I, as it may have evolved in several recent court decisions concerning federal aid to education. The constitutional examination, by Professor George Anastaplo, proposes alternative constitutional formulations that meet the objectives of the present program.

In between we examine in detail national survey data indicating problems with the present approach, and administrative details of implementation in a large number of districts which allow us to define the key administrative trouble spots, as well as examine the program for troublesome (or beneficial) effects on the school systems themselves.

This study of the delivery of Title I services to private school students is the product of extensive written consultation with 130 private school officials (50 of them super-

intendents) whose operational concerns include Title I programs, field interviews of over 175 public school officials (superintendents and Title I administrative officials), principals, Title I teachers and supervisors, federal program coordinators, school principals, and parents of children enrolled in the Title I program and with over 50 SEA and BIA officials who supervise the implementation of Title I services to private school students. These field interviews were open-ended consultations following a standard protocol designed to explore in detail (1) the criteria for selecting private school students for Title I services and for establishing the kind and amount of services received; (2) the planning of the program, and the procedures for and quality of its execution in relation to the program delivered to the public school students enrolled in Title I; and (3) the impact—beneficial or adverse—on the private school itself.

The field studies were used to develop the primary statement of the operation of the Title I program with respect to the inclusion of private school students. The studies present a reasonable description of the basic elements of the administration of Title I services to private school students. They highlight the points in the delivery of services where biases can enter the procedures and criteria and either increase or decrease the chances of a private school student's

effective participation over the chances he or she would have had as a public school student. Detailed analysis of the local administration of Title I services is presented in Chapter 3.

As assessment of the overall extent of the problem was not possible with the information regularly collected by the Office of Education in the course of its monitoring of Title I implementation. This is itself an important piece of information, because it means that OE does not systematically enforce the requirement that the legislation be a child-benefit program, rather than a program of aid to the public schools. In the operation of Title I, there are no advocates of the interests of the children other than the schools in which they are enrolled. Private schools, even though they are denied any control over Title I funds for the purpose of seeing to it that the program is delivered to their students, are the only effective means of protecting the interests of those students.

The Office of Education has not established and funded a division with the resources to review the extent to which private school students are served. OE does not regularly collect the information required to detect bias in the delivery of services to private school students. It does not require specific data to be collected by the state offices of education which would permit a review of the adequacy of

the state and LEA efforts to deliver these services. It does have an excellent office which handles charges by private schools that their students are not adequately served, but it has understaffed that office and consistently denied it the resources necessary to carry out reviews.

Only after 10 years of ESEA Title I funding did OE even move to force the delivery of Title I services in four states which have substantially failed (or outright refused) to include private school students in the program. The efforts to enforce the provision that private school students be served have moved slowly forward in the past three years. The poor record of the Office of Education does not reflect the abilities of the section concerned with services to private school students, but the political and administrative decisions at the top of the HEW education hierarchy. Within the past three years there has been some improvement in the efforts of OE to enforce the requirement that private school students be included in programs, when complaints that students are not equitably served reach federal Office of Education officials in Washington. Although its reactive involvement in the problem has improved, prior to the Education Amendments of 1978, OE had not improved its active efforts to monitor and evaluate the equitable inclusion of private school students in the Title I programs.

In its assessment of the Title I program, NIE designed a national (sample) survey of public school districts for intensive investigation of the implementation of the program. Based on 100 school districts, this investigation did produce some information about the delivery of services to private school students, and that information was analyzed (see Chapter 2) for this report, permitting us to obtain an overview of the problem faced by private school students in the absence of adequate data available to OE. The analysis indicates the likelihood that private school students are substantially underserved by the Title I program. The reader must be cautioned that the sample is not a representative sample of private school districts and so not a representative sample upon which an unbiased estimate of the problems of private school student participation in the program nationally can be made. But the direction of the bias in the sample is known: Private schools are concentrated in urban areas of the Northeast and North Central states and in the Midwest. The NIE sample, reflecting the national distribution of public school districts, will give more weight to the problems of private schools in the South and West in the overall projections. However, a greater proportion of private school students in the South and West are eligible for Title I services, so the biases tend to cancel each other

out. In addition, the NIE survey contains a representative sample of urban, suburban, and rural districts. Private schools are concentrated in urban and suburban areas, so that the analysis will overstate the importance of the experience of private schools in rural areas.

The bias is not so serious that the analysis indicating a substantial problem should be ignored, however, and it principally affects calculations of the degree to which private school students who should be served as participants in Title I programs are so served. A second portion of the NIE survey concerned the degree to which private school students counted as participants were being served. The question dealt only with hour of instructional time, a fair standard to apply, since both private and public students are selected for Title I services by the same standard of academic achievement and should be expected to require approximately the same level of remedial services, with any variations in level of need being random between the two groups of participants. However, ~~they~~ survey found (1) that private school students received only 18% of the instructional time given to public school students; and (2) that Title I class sizes in the private schools were two and one-half to three times larger than in the public. (The private school student consequently received only 30% to 40% of the

individualized attention the public school child received during the one hour a week of class time allotted him.) Furthermore, the teachers assigned to the private school students were systematically less qualified.

We should emphasize that these very serious indicators of difficulties were found in districts reporting they were serving private school students. The districts who fail to serve them at all are not included. The magnitude of the inequity indicated by the NIE sample is extraordinarily great. The degree to which the problem is overstated by the weighting of the NIE national sample is not likely to have produced so serious an indication of difficulties. Such a significant degree of problems has been discovered with the quality of services received by the private schools. This problem stands independent of the problem of inclusion or private school students in the program. Private school students may appear to be served, but what they receive is far from what the public school students receive.

Given the bias in the NIE sample, so far as projections of private school student problems were concerned, we designed a survey of a sample of public school districts, selected according to an elaborate set of criteria which ensured regional and suburban, rural, urban diversity, and sampled states according to the degree of oversight on Title I

matters exercised by the SEAs according to the State Administration Study carried out by NIE. The sample was also stratified according to approximations of the strength of the private school community in the locality, including the strong areas of the Northeast and North Central cities, and the weaker communities of rural and Western towns. The essential purpose of this portion of the field questionnaire was to discover whether the inequities reported by the national survey data were present in the sample was selected. It was not possible to design and field an accurate national sample of private schools/students. The field survey we conducted was designed to discover whether the national trends of the NIE survey did occur in these cities, and to reveal—when inequities did occur—the source of the problems in the administration of the programs. The cities in this survey included roughly 35% of the private school enrollments in the country, so that its findings could be used to reinforce (or undermine) confidence in the national survey data, and to illuminate the causes of inequity of services if we found private school students not receiving their due share.

We first approached the field survey through the state education agencies (SEAs), requesting from the SEAs identification of the kinds of information which would permit us to assess the degree to which private school students were

served. We then approached the selected school districts through extended telephone interviews (averaging 30 to 60 minutes). We interviewed school officers in 34 states and 42 school districts, a total of 150 interviews, in this phase of the study. The reports of these studies simply reinforced our previous findings, particularly the specific points where bias against private school students entered the administration process.

We did find in a number of states, that substantial legal problems at the state level hindered the equitable delivery of services to private school students in a district, despite the best efforts of the LEA personnel. We also found that SEA rules themselves limited the participation of private school students, particularly in California, and that the problem of effective supervision of Title I staff serving the private school students seemed more severe in rural areas. Surprisingly, the quality of Title I services delivered to private school students depended to a large extent on the interest and abilities of the private school principal, especially in districts with relatively weak offices for non-public student services. (This study of the SEAs is presented in Chapter 5.)

Both the law governing the provision of federal funds to private schools, and the traditional role of private schools,

are different on the Indian Territorial Lands for the tribes with treaty relationships to the U.S. The first federal aid to education was government funding of private schools in Indian territories, and funding of schools operated in the reservation areas. The governments of several tribes support some aspects of private schools, and today some federal money continues to support private schools on Indian lands. Furthermore, the public school systems charged with responsibility for the education of American Indian children are handicapped by lack of tax base, and in some locations by disinclination or by the extraordinary administrative task of finding teachers willing to live and teach on remote reservation sites. In some locations, public school principals of target schools programmed to receive Title I services declined the services for their schools. (The reason offered was that the services would cause too great an administrative burden.)

We carried out a special study of private school students on the Indian reservations to see the special way in which they were served by Title I programs. The study was complicated by the fact that the Bureau of Indian Affairs operates schools on the reservation which are considered private schools, i.e., not counted as part of the public school system, and which receive Title I funds as a transfer of funds between OE and BIA. Private school students do not receive Title I

services from BIA schools, since the distribution of federal funds to these schools appears to be based on BIA enrollments (or Indian student population) and not on student population resident in the geographic bounds of the school district, as is the case with public systems. In other words, the public school systems are allocated federal funds on the basis of the entire low-income population of their geographic area; they therefore receive funds designated to provide services to private school students. But the BIA schools receive no extra funds for students enrolled in non-BIA schools. (The study of the private schools on Indian reservations is presented in Chapter 6.)

Chapter 1

POLITICAL BACKGROUND

THE INCLUSION OF PRIVATE SCHOOL STUDENTS IN ESEA, TITLE I

Title I of the Elementary and Secondary Education Act of 1965 was one of the finest examples of the art of legislative compromise ever to pass Congress. The law touched the most passionately felt areas in American public life and won support from seemingly implacable foes, which says a great deal about what we should expect from it. It is many things to many contrary supporters and satisfies them all -- to a degree.

Donald K. Price identified the two major factors determining the politics of federal aid to education as race and religion. But entwined with race, and surviving it as an issue, was the concern over federalism and local control of education.* The concern for local control has strongly influenced all aspects of the law, especially the way in which the law affects non-public schools.

We are examining the way Title I serves children attending non-public schools -- some of which are religious schools.

The question of serving private school students affected the interests of several groups who were forceful participants in the political struggle to enact Title I. To understand the character of the act, it is useful to review what its most powerful supporters expected of it, and feared or wished to

*Donald K. Price "Race, Religion, and the Rules Committee" in Allan Westin, ed. The Use of Power (New York: Harcourt, Brace and World, 1962).

gain by including private school children. They were:

- Labor unions, who saw the entry of the federal government as an opportunity to increase the numbers of jobs and job benefits, especially in the teaching profession, which was then approaching a period of decline.

- Professional administrators of school systems, who saw the federal entry as a means of increasing resources for their schools without having to force local governments to choose between schools and other needs.

- Non-public school authorities who believed the federal government could relieve some of the burden of the support of the non-public schools (their objectives were essentially the same as local public school administrators, but, applied to the private sector).

- Advocates of minority groups, who looked upon schools as the most important of all governmental activities for advancing their interests (and education has had a particularly close connection to the civil rights movement since the 1950's because education was the arena in which civil rights supporters obtained their greatest political successes).

- Big-city mayors and political leaders from the most populous states, who sought relief from the rising cost of education.

- Education reformers, who sought to up-grade the minimum standards for local schools, and to introduce new approaches for solving educational problems to schools throughout the country.

To summarize, the principal objectives of Title I's various supporters were revenue for local purposes (private and public) without political cost to local governments and private bodies, the advancement of minority interests, and educational innovation.

But even in these broad goals contradictions mark the law. The unions were active in the public sector, not the private; for the jobs to satisfy them the jobs must be placed in the public sector. Public education authorities typically knew little of private schools, and spoke of them as preservers of class and racial privilege, propagators of unenlightened superstition, and as public schools' sole competitors. Public funds, their leaders argued, belonged to public schools. And a dollar for education aid to private schools was a dollar out of the pocket of the public schools. So on this matter, public school administrators and the labor organization were in fundamental agreement.

Private schools were not a well-organized political force. At the time, no organization existed which could speak for the interests of all private schools. Each of the several major organizations spoke only for its member schools and without effective policy-making authority. Even the Catholic school systems could only most generously be described as a federation within each diocese, and there existed virtually no inter-diocese organization or agreement. And the Catholics were models of centralization compared to the Lutheran or Hebrew systems, and these tightly organized when compared to Seventh Day Adventist schools or the independent schools. But although not organized, the private schools as a whole had strength. They enrolled 14% of the country's student population, and their biggest enrollments -- and consequently their political

strength--were concentrated in the urban areas of the East and Midwest.

The Roman Catholics took the lead in the private school sector; as noted they were the best organized and the aid-to-private school debate coincided with the period of rise of Irish Catholics to the highest reaches of political power in national politics. It may have been only coincidental that the Irish were the chief prelates of the Catholic Church and that the cities or Sees which were most powerful within the church were also influential political centers, but in any case the Catholics made their first concerted effort to defend and advance their interests in the national legislature on the school aid issue, and they were an effective force. The Catholics argued that parents who sent their children to private schools were paying twice for education at the local level, and they would not permit the same pattern to be established at the federal; funds would support both public and private schools or neither.

But an even more divisive conflict existed in the area of federalism. It is ironic that education carries with it a reputation for being above politics, since it is second only to defense in terms of the size of its enterprise in the list of government services. It spends more public funds, has more employees, and directly contacts more people for a greater portion of their lives than any

other internal government activity. Local control is an element of the doctrine of public school ideology. For decades, Southern legislators were able to manipulate the fear over loss of local control in education to kill federal aid-to-education bills (by supporting mandatory integration amendments to education aid proposals and thereby forcing pro-aid forces to split over the issue of local control). Local education officials and to a lesser extent, local political officials did not want federal direction of their local school systems and were willing to give up federal aid to preserve their local influence. But opposing them were the education reformers and the civil rights advocates, who wanted the federal government to make substantial changes in local systems by use of its funds.

The racial issue was settled prior to the adoption of Title I by the Civil Rights Act of 1964, Title VII, which prohibited the expenditure of federal funds in segregated institutions. The amendment so often suggested by the old Southern guard in their strategy to wreck the support for federal aid was no longer necessary. The "religious issue" was altered by the Supreme Court, which made it clear in several decisions that its view of the First Amendment prohibited public funds being directly given to religious schools. The court decision had the effect of forcing Catholics and other non-public aid

supporters to relinquish their hope that some support might be given their schools, and to fall back on a defensive position that, at the least, children attending private schools would not be penalized by having to give up educational benefits from the federal aid they would have received if they attended public schools. It may even have been, in the early stages of legislative consideration, that child-benefit proponents in the non-public schools believed the approach would permit their schools some relief of the increasing costs of education.

The child benefit approach also fit with a key objective of the civil rights advocacy groups and the educational reformers. It substantially advanced their goals of individualization of education, combined with a compensatory (redefined to mean prescriptive) approach.

The impact of the child benefit approach has been largely unappreciated. Title I has worked "impossible" changes on the local school system. It has produced more changes in American local education in a shorter period of time than the most optimistic egalitarian reformer would have dared suggest practical. Its most impressive accomplishment, from a political perspective, is that it has forced local school districts to redistribute their resources to their students in poorer neighborhoods. No Title I school may be spending less tax levy funds per pupil than any non-Title I school. The regulation required

districts to remove resources from schools receiving above average per pupil allocations, or to place new resources into poorer schools until equal funding levels had been reached.

In the local politics of education, it is virtually axiomatic that stronger neighborhoods (or economic classes or groups) receive disproportionate resources for their schools. To equalize a funding by redistribution required that the groups most influential in and most actively supportive of the school systems would seek to disadvantage, relatively speaking, their own schools in favor of, the schools of those who had not been able to make so effective an appeal for support, and that the powerful groups would take the action voluntarily, while retaining their power. There is no instance that the approach had ever been adopted in any school system in all the literature of the politics of education. But it has been accomplished, or is being accomplished, in virtually every American school system only ten years after the introduction of Title I. And accomplished without any political turmoil, without public resistance.

The change stems from Title I's adoption of the "Child Benefit" approach, which must be contrasted to the approaches previously advanced, the institutional aid approach.* An institutional aid approach would have

*Note: The conventional distinction between general aid and categorical aid taps different dimension. Categorical aid could have aided on-going school programs, such as reading. Categorical aid could have become simply a specialized type of general institutional aid.

granted relatively unrestricted funds for operating expenses to school systems. And it could have been considered simply a "tax relief" effort by the federal government. But the child benefit approach held, in essence, that the new federal funds belonged not to schools but to the children themselves. The children were identified (by broad criteria) by the federal government and the type of school the children were enrolled in was not a part of the criteria.

The funds were to be used solely to provide extra services, above and beyond the local effort, for those children, and not to relieve systems of any portion of their educational obligations. Systems were not to apply these funds to serve any other children than those fitting the federal criteria, and this meant that systems could not spend less than their tax levy funds on children receiving Title I aid than on children not receiving aid. Systems had to first equalize their aid before spending Title I funds, under penalty of having to reimburse the federal government for money misspent (by substituting for local effort) in subsequent years. In brief, to avoid aiding private schools, the approach avoided aiding any schools in their normal efforts. The approach forced the equalization of the distribution of resources through out each participating system.

This approach fit well with the demands of both the unions and the public school administrators, since it

meant a much greater increase in the number of education positions than could otherwise have occurred, and it meant that all those positions would occur within the public sector. Even to serve the needs of non-public school children, public school teachers would be hired. For the first time, local school districts would receive aid based on the total number of children residing within their bounds (or some portion of the total population) and not simply on the number enrolling in the public schools. Private schools would not, by their presence, be denying public schools a greater portion of funds -- the case in per pupil state aid. So the big urban centers of the North. East and Midwest, which have 25% up 40% of their children in non-public schools, would not be penalized. The child benefit-theory provided a means that could unite both private and public school supporters of aid, unions and local education leaders as well as reformers and civil rights advocates.

Because, under the child benefit approach, only children in the most impoverished areas would be eligible and then only those with the greatest need--conventionally, defined as "farthest behind in scholastic achievement"-- most advocates of the aid's going only to public school must have been reassured. They would not have been likely to suppose that many such children could be enrolled in private schools. But more are than is

commonly recognized. In the West, Blacks enroll a greater percentage of their school-aged population in non-public schools than do whites, and the proportion of minority children (Spanish American Indian, Oriental, Polynesian, Black, etc.) in private schools is higher than the proportion of whites. In fact, in some of the counties included in our survey which have large proportions of American Indian students; in absolute numbers, more minority children were enrolled in private schools than in public schools.

The federalism question ensured that the child benefit theory would be followed. With education reformers and civil rights advocates pushing a strong federal effort, were not local education leaders concerned that they would begin to lose control over their schools? The reformers wanted federal aid specifically to advance changes in the schools, and this would imply some change in local control. The ingenious Title I law was able to sidestep the issue. Local populations were not unanimously behind local control. Those who were most influential within the local schools were, of course, generally most supportive of what they were doing, and opposed to "outside" intervention. They had the most to lose. But, generally speaking, the poorer sections of local school systems were shortchanged in the distribution of educational resources

* We would certainly anticipate the importance of the concern since it had been a factor helping defeat aid to education for over 80 years.

and in the attention to their peculiar problems the system gave, and certainly in the results the schools obtained in educating their children. These dissatisfied local groups were not strong supporters of local control, because those who controlled the local school systems were not meeting their needs. The leaders of the schools were ignoring the needs of the poor for a number of reasons, among which inertia was very important. But to help the poor meant playing Robin Hood -- diverting old resources from wealthier schools to poor schools. The politically strongest education support groups in any community tend to have as members those who directly benefit from the better schools, and to watch carefully the distribution of new resources and resist any cuts in resources allocated to their member schools. The poorer groups began to cause difficulties for local education leaders not easily resolved: Title I in its child benefit approach solved the problem neatly. The aid was to be given only to the students residing within the most impoverished areas of the system. It would satisfy the demands of the poor without costing the wealthier neighborhoods anything. By satisfying the poor, who would otherwise have had to be helped out of the total local education pot, Title I actually would save money for the system and make it easier (it was anticipated) to help even the schools of the wealthy. Further, the aid would not force federal policies into the schools of those who were politically most in support of local control of education

given the likelihood that their neighborhood schools would be in wealthier areas, because Title I funds would not serve these areas. So, it was anticipated, federal funds and federal policy would pose no threat to local control in those schools in which it was most strongly appreciated and supported. Finally, the concentration of funds on poverty area children, many believed, would neatly permit private schools to be involved in principle, but eliminated in practice. Few believed there would be a very large proportion of poverty-area children attending private schools and so academically deficient as to be eligible for Title I services. The myth that private schools educated only the wealthy, and screened out children with academic difficulties, was widespread.

Chapter 2

ON COMPARABILITY AND BIAS IN THE ADMINISTRATION OF TITLE I SERVICES TO NON-PUBLIC SCHOOL STUDENTS

Title I of the Elementary and Secondary Education Act of 1965, as amended in 1974 is broadly formulated to provide remedial educational services to children whose education is hindered by their environments. Allocations are made to states and qualifying sub-units, local education agencies (LEAs), by a formula that considers each area's low-income school-age population, weighted by the count of children receiving supplemental public aid. Hence, all children residing in an area are counted for purposes of establishing the allotment. The allotment is not determined by the public school registry, or even by the register of all schools in the area. It includes non-public school students, and children not attending school. Title I charges LEAs, almost all of them public school districts, with responsibility for delivering remedial education services to all eligible children within their jurisdictions. All children meeting standards (relative to the local community) for residence in low-income areas; and low rates of scholastic progress are eligible for the program. Eligible children may attend public or private schools or various types of juvenile institutions. Their eligibility is not a function of the type of institutions they attend.

Because allocated funds are not sufficient to serve all qualifying students, students are selected from the pool of those eligible according to the educational needs which the program can treat. The total number selected depends on the LEA's decision

about the amount of funds it will allocate per student. LEA authorities, most of them employees of the local public school system, also make determinations which affect the selection of participating students. At each point, local authorities may intentionally or unintentionally adopt procedures which introduce bias against the opportunity for non-public school students to participate in the program comparably.

In some respects, charging public school systems with providing remedial education services to non-public school students is like charging General Motors with warranting Datsuns. Do private school children enjoy an equal opportunity to participate in the program under these arrangements? And do they receive comparable services to those they would have received if they had been attending public school? To answer these questions, we will look (1) at the general factors influencing the public-private relationship; (2) at the administrative procedures critical to the delivery of Title I services; and (3) at other areas of evaluation, such as the effect of Title I programs on the school's regular academic program.

A. Relationships Between Public and Private Schools:
What Influences the Way LEAs Involve Non-Public
School Children in Title I

The nature of the private school has influenced Title I's approach, and we should expect the historic local patterns of interaction between public and private schools

to continue and characterize the way in which the public schools operate toward the private in Title I. (However, we note here, and will return to the point later, that Title I has greatly altered public school personnel's attitudes toward private schools, and private school staff's attitudes toward public, according to most of the Title I personnel interviewed in the course of our study. Title I is changing the long established patterns. The full development of the changes remains to be seen.)

Private Schools Are Usually Religious. For purposes of Title I, the most important aspect of private schools is that they may be religious institutions. The private schools attended by Title I children are almost always formally and often actively church-affiliated. This fact has constrained Title I law because of the present Supreme Court's interpretation of the First Amendment. If things were otherwise, private schools could have run their own programs of remedial services for eligible students, but the court has prohibited this approach out of a fear of establishing religions. We should expect non-public schools enrolling Title I eligible students to be religious, because the cost of education is too great for lower income families to bear alone. The cost must be socialized across a broader group than the parents, and in America only religions have provided the rationale to carry out the enterprise. The religious purposes also provide motivation sufficient to encourage teachers to contribute their services.

Under some circumstances, non-religious private schools do enroll some Title I target children, but these are rare. In other countries some political groups have provided motivation sufficient to support independent schools, although even these almost always receive state aid of some form. In American inner city area, a rare politically-supported school can be found belonging to the Black Panthers or some similar group. Some socio-political motivations do operate to lower the salaries teachers require in these and in some religious inner city schools. But, with one exception, political belief has not been a sufficient bond to permit the costs of private education to be socialized.

The exception is an important one, and will be discussed again when we are examining the responsibilities of public school systems to private school children. The Southern Segregation Academies are schools founded and supported primarily out of shared political belief. There are at least 375 and may be as many as 2,500 segregation academies in the U.S. No accurate accounting exists, but these may enroll as many as 225,000 students, or a little less than 5% of the entire non-public school population. Substantial numbers of these students will be Title I eligible.

In the case of both religious schools and politically-founded schools, we find target area children in the schools because the cost of education is subsidized by a larger group. And here we are making the reasonable assumption that the families of most children living in target areas are themselves

lower-income and cannot by themselves support the cost of the education of their children. They would not be found in private schools which are not subsidized. But under some circumstances from families capable of paying the full cost of elementary and secondary education live within target areas and are therefore Title I eligible. Such circumstances occur more often at the high school level, where an LEA run only one high school for the entire district, or in smaller districts with a few elementary schools are an even distribution of poverty in all schools. Then the entire LEA is a target area, and every private school child drawn from the area, even if from quite a wealthy family, is eligible. Family income is not a criteria for a child's eligibility to Title I services. All the students at a prestigious boarding school located in such a district are eligible.

Under the present law, then, of the private schools likely to be enrolling Title I eligible children, the only ones Constitutionally qualified to run their own program are politically-founded schools, segregation academies (a species of political school*) and wealthy independent schools.

However, it is worth noting that what makes a school a religious institution has never been precisely defined by the court and that under more precise definition, some of the inner-city schools now considered religious institutions may be found acceptable "LEA's" for Title I purposes. Many inner-city

* Segregation academies, under the Civil Rights Act, could not legally run a segregated Title I program.

private schools sponsored by religious groups, do not have as a purpose religious indoctrination or conversion. The religious purpose they serve is that of charitable work, and no efforts toward conversions are made. Quite simply, not all activities of religious groups are religious, nor even for the purposes of furthering religion. (Religiously sponsored interracial councils, union organization drives, orphanages, hospitals and other similar activities are examples.)

Of the religious institutions sponsoring schools which serve Title I eligible children, only a few are even approximately religiously exclusive. Well over 90% of all private school students receiving Title I services are enrolled in Catholic schools, and a high proportion of these students -- we estimate between 25% and 50% -- are not themselves Catholic. The balance of the private school participants are enrolled in Hebrew and Lutheran schools, and some smaller sect and independent schools. The Hebrews tend to be more religiously selective than any of the others, but even they admit non-religious Jews (such as the recent Russian Jewish immigrants) without question, and do admit some non-Jews. Some of the schools of the smaller sects may be more rigidly selective, but the Lutherans, Friends, Episcopalians and others with eligible students tend to be even less selective than the Catholics.

Governing Structures of Private Schools. A generalization such that "private inner-city schools are not religiously dogmatic, and do not attempt to convert large numbers of children" is

dangerous because many exceptions could be found. Many exceptions to any generalizations about private schools (except this one) can be readily found, because private schools do not follow rules, and this is another important aspect of private schools with consequences for Title I. Private schools are not themselves a system. They possess no central policy-making organization. The governing mechanisms, the policies and the practices of private schools are important to Title I. They are important to Congress in considering how it should involve private schools in the program. And important to LEA's seeking to administer Title I services to children enrolled in private schools. In our previous discussion of the religious nature of private schools enrolling target children, we have seen how important these matters are. School policies and governing mechanisms appear to be the basis on which we judge whether private schools can properly deliver Title I services themselves.

The fact is there are about 20,500 private schools. We have acceptable information on more than 90% of these about the locus of their policy-making, and we lack information for the rest because they are so independent and autonomous that they are not even readily identified by education authorities. There is nothing in the entire private sector even remotely comparable in the degree of its centralization to the normal public school system. In the policies that count--admissions, curricular religious education, staffing, financial (tuitions, salary, class size, etc.), and discipline, and even such basic system-matters such as school calendar--there are 20,500

effective centers of decision-making. Without question, the most centrally organized private school system is the Roman Catholic, and it is generally acknowledged that this system is not centrally directed from above the diocesan level. Catholics project an image of their possessing a "system," but they do not find it strange that the schools in their system should develop their own programs, enter into their own contractual arrangements with teachers, decide their own admissions and disciplinary policies, and find their own financing. Virtually every central school board office in the Catholic system refers to itself as a service center, a resource available to the schools if they desire assistance. The diocesan hierarchy has made some "life and death" decisions concerning local schools, but the occasion for these decisions has been the request of the local schools for central support, an unusual request for the Catholic system because that system has not traditionally financed local schools from the central treasury. Decisions to close schools have been decisions "not to begin aid," or to fail to continue aid recently begun. But even in this matter diocesan power is not simply supreme: a central decision in one western diocese to close all double classrooms in elementary schools (so that each school would have only first grade, etc.) was ignored in almost all schools financially able to continue the extra grades. The schools did what was best for them, in their own light, carrying on by their own resources. A recent survey has examined Catholic schools on a number of important educational and religious school policies, and found

that even in the same school "systems" the policies followed differed from school to school. At best the Catholic system is a loose federation of schools.

But the Catholic system can claim to be in some loose system of communication; no other private system approaches the level of Catholic system interaction.

Despite the formal autonomy of private schools, every individual school might choose to adopt the same policies because the ideological cohesiveness of the group was so great. But rather the opposite is the case. Research has shown that the schools even of Fundamentalist sects often differ widely in practice from the positions they say they hold in common with the group.

For all practical purpose, and Title I is one, we must consider each private school, no matter that it may be a member of a private "system", comprising a system in itself. There is no single official who represents the interests of all private schools. Nor even is there such a person in most private "systems." Title I has encouraged private systems to create such a position, because LEA officials desire to deal with those in the private system with commensurate authority for the simplicity of the administration of their program. But no one in the private system has such authority. At best, the newly appointed private central Title I officials represent the interest of those schools that have shown some interest in the program. This is not to say such private officials are negligent; the problem is structural. In fact a great

deal of the time of the private school Title I "coordinator" appears to be spent in encouraging the local private schools to participate in the program fully. But most private schools do not have even such a central "service" person to represent their needs. The autonomy of the private schools is an important characteristic affecting what public school systems do for private school children in Title I.

Inner-city schools do not appear to be regarded as a means of converting children; as a general rule the schools accommodate themselves to the religions of their children. Catholic schools with oriental student bodies are most often Taoist or Buddhist in character. In American Indian communities, the schools reflect the tribal religious traditions, even though Catholic, or Lutheran.

In sum, most private schools enrolling Title I are religious, and the exceptions are not large in number and involve other legal and policy problems of their own such that Congress is not likely to design a program which would directly involve them. Under recent Supreme Court rulings, Congress can only aid children to overcome the obstacles caused by their class and ethnicity by giving the funds to some non-religious service. Congress has turned first to public school systems. We will discuss the experience with these in Section B, below. If these fail non-public school children, Congress has turned to private non-profit corporations which are called into being when the "by-pass" provision of Title I is invoked. The brief experience with by-passed will be discussed in Chapter 000.

The Early History of Public and Private School Competition.

Public and private schools have a history of opposition which has its residue in present relations, and are in competition with one another. When Title I relies on public schools to provide services to non-public school children it is asking local districts to bridge the distance and the differences that is felt by school administrators, officials and supporters in both sectors, and we should expect some resistance to the request, and some difficulties in compliance, especially in the early years of Title I.

Historically, the bitterest political fights have been fought between those who are most influential in public schools and supporters of private schools. The fights have been among the most ideological in American experience, as is suggested by the very names of the two suitors -- what in America are called private schools are in England called public schools: what in America are called public schools are in most advanced European and America democracies called state or government schools.

American public school systems have their origin in schools sponsored by community churches for the education of the poor. Our current understanding of the separation of community service and educational activities into religious (private) and public realms leads us to misunderstand the nature of the public schools at that time. Many people founding American local communities had only their religions and the religious persecution they had suffered in common. The founders and leaders of these early cities tended to comprise a reli-

giously homogeneous group, and their communal political life often tended to be little more than an aspect of their communal religious life. Tensions arose when outsiders, foreigners who were in principal welcome to the economically developing communities, actually moved into town, especially when the newcomers among formed themselves religiously coherent communities. Early in the life of the communities, there were no "public schools" per se, but only church schools for those of less wealth and tutors for the children of the wealthy. But the distinction between public and private schools was academic when all the members of the community belonged to the same church; citizens undertook to insure the education of their children through their church rather than through their government. From a policy point of view, the approach resulted in a more egalitarian and even redistributive sharing of the costs of education, since communities would have raised taxes only upon property, whereas church income was the result of (most commonly) tithing by all members of the community. Church income was pegged to a fixed percentage of individual income, with the wealthy expected to add more and underwrite more expensive church enterprises, whereas public income was derived almost exclusively from property taxes, which then as now missed much of the real basis of wealth in the communities.

The communities faced a crisis for their schools when members of other religions arrived. Because their families were not members of the community church, the new children would not be admitted to the church-schools. The new families

The new families would often be too poor and disorganized to form their own church schools. When the established church schools opened their doors to those of different religions--in much the same fashion that the church-schools located in American inner-city neighborhoods are today doing--the finance of the school problem. An increasingly smaller proportion of the community (the original church's members) paid for the education of all the children, and the old community leaders finally turned to public funds to support their schools. Communities typically provided the pastor of the leading church with funds, and charged him with the responsibility of running schools for the poor. These were the first public schools. For much the same reasons, those responsible for the administration of modern private school systems have sought public support.

From the beginning, the schools provided for the children of the poor who were not members of the leading church were different from the schools operated for the church members. Quite simply the charity schools were designed to meet only limited public objectives, to insure--in most communities--that children be able to read and write, count, and know the Bible and respect its precepts.

Quite frequently, the poor did not wish to send their children to church schools. Over time, communities passed laws requiring that children attend schools. Although economic circumstances of the poor were important, often the poor resisted sending their children to "public" schools for political-religious reasons. Peasant Irish Catholics comprised the

crucial wave of immigrants whose problems most strongly shaped the evolution of the public school systems. The political control of the established church-schools--the public schools--to which the Irish were required to send their children, were in the hands of Anglican and Presbyterian elders, sects closely related to the Church of England. Irish Catholics had been forced from Ireland by the famine that had killed many of their people, and the famine had been caused by the economic reduction and exploitation of Catholic Ireland by its English conquerors. The English Bible, the King James version of the Bible, became a symbol of the English nationalism and the English conquest of Ireland. The Irish found that the primary purpose of the public schools was to teach their children to read and know the King James Bible. The Catholic Irish were the strongest original proponents of the separation of the church and state in education, the separation of the Protestant churches from the public schools. Eventually the Irish established their own school system, to protect their religious identity from the Protestant influences of the public system.

But to a degree, the protestors were successful and new public boards (comprised principally of the members of the old church, or its replacement in the leadership of the community) took control of the public schools. The curriculum became more neutral or "secularized." The secularization of the schools meant the attempt to remove, insofar as was possible, their specifically Protestant character. The official ideology, announced by Horace Mann, was essentially Unitarian, a kind of

non-doctrinaire blend of the beliefs of Christian sects and enlightenment thought. Even this was found by the Catholics to taint the public schools with Protestantism. And eventually the Catholics produced their own school systems.

Much the same history could be repeated to explain the evolution of other religious-ethnic school systems. The Amish, for example, have produced a school system solely to prevent their children from being exposed to the secularizing influences of the public schools. Virtually all strong minority political groups have produced their own school systems: the exceptions are those groups which obtained political control of their own communities. For example, the Catholic schools system in Acadian Maine is not highly developed, but that is because many of the Acadian (Frenchspeaking) communities are homogeneously Catholic and of course in complete control of their public institutions, including their schools. In such a community, in the past, Protestants would have to establish their own separate school systems to protect themselves from Catholic influence over their children. A more dramatic example is provided by the Mormons, whose extraordinary beliefs regarding their relationship to the Judeo-Christian community set them apart and earned them great enmity. The long march to the Mormon territory was for fundamentally political reasons, to permit them to develop in peace by virtue of their isolation. The community had no need for "private schools" to oppose the public: it comprised the public. It has today no extensive system of schools even though as a religion it is deeply involved in the most detailed

aspects of the lives of its adherents, and would seem to have an interest in the education of their children.

Private school systems began for political reasons, often related to the political history in the old country of the religions of the first and then succeeding waves of immigrants. Thus, areas which did not become religiously heterogeneous did not develop substantial private systems, unless these were a heritage of a time before the establishment of public school systems. These political factors explain the wide range we find in the proportion of schools which are private in each region. Where there are more private schools, there were more intense and lasting political-religious conflicts (understanding that where one group was dominant without challenge, there were no conflicts). By far, the highest proportions of school children enrolled in private schools are found in the East and Mid-west.

The original political-religious conflicts which underlay the founding of the first of the private school systems are in the dim past, but to some extent the tendency of private systems to be used by minority groups to preserve their cultures (a portion of which are their religious identities) constantly renews the tension. The private school systems have been particularly hospitable to political minorities, and enroll disproportionate numbers of immigrant and first generation children in many communities. The tendency of the private schools to enroll minorities has caused some political tensions in local communities, although no more than the difficulties

raised by the presence of the immigrants in the community itself. But at the same time, the new immigrants produce forces which are lessening the sense of opposition felt by schools in the public and private sectors. New immigrants, with the recent exception only of Russian Jewish refugees and Mexican illegal immigrants, tend to use both public and private school systems. They are therefore present in both sectors with similar educational problems, and creating in each a sense of sharing problems with the other. And this happens even though the fact that the minorities are choosing schools in both systems suggests that each sector's schools are in open competition with the other for the students.

Bias from Competition. Competition between public and private schools can produce difficulties for the comparability of the treatment of children from the private sector who should receive Title I services. The likelihood of difficulties becomes readily predictable if we consider a simplified model of the competitive situation affecting both public and private schools.

The model is simplified in that it describes underlying tendencies, although in the real world many human and systematic factors may intervene to obscure or even substantially nullify these tendencies. Because all children must attend school, competition between public and private elementary and secondary schools (as distinct from pre-K and higher education) takes the form of a zero sum game. Any increase in one sector must come at the expense of the other. In times of increasing student

populations, the zero sum character of the game was hidden by the expanding student base. Both could increase simultaneously, and shifts from one sector to the other were hidden, or their effects compensated. In times of decreasing student population, the zero sum game becomes painfully clear, and the losses competition produces are magnified by taking place at a time in which the schools would have been shrinking anyway.

Children attend private schools because their parents prefer these to their public school alternative, and so there is a degree of competition between the two sets of schools.*

Whereas public officials, and even school board officials, may be pleased by the presence of private schools because they reduce tax revenue needs of a district, school systems leaders--especially administrators and union leaders--would not naturally share the same view. Private schools mean a loss of FTE (teaching positions) and a lower budget for public school systems. In some districts these forces have encouraged officials to make decisions which have biased the district's service to non-public school students in Title I.

*In reality the competition is more complicated, since individual public schools can lose their clients to other public schools within their own system or in another system. Private schools can actually be a force for retaining families within the public school attendance area. And since some families split their children between public and private schools, the private schools can help the local public school in its competition with other public schools.

But countervailing forces, in some districts more powerful than others, encourage equitable treatment of the non-public school students. Some pressures come from within the public schools themselves, and some from outside the system. Preliminarily, we expect the most significant of these forces within the school administration to include the tendency of the branch of the school bureaucracy given responsibility for non-public school students to fulfill its mission. Consultation between the board of education and the non-public school on the appointment of the director of the non-public student services in Title I -- a normal procedure in the systems visited -- would tend to increase this likelihood, since consultation inhibits the appointment of anyone not interested in the job, and the use of the non-public position as the boards' Siberia.

The countervailing effect of internal bureaucratic politics is aided by the tendency of Title I administrators to write out and formalize their rules, in anticipation of audits or lawsuits, and a way of stilling conflict over the distribution of Title I resources among public school sites. As Title I has aged, it has become more formal in most districts, with agreement and practices increasingly written as rules.

In addition, LEA administrators may be moderated in their feeling of competition by the pressure of a sense of shared culture they may feel for the non-public schools.

The feeling may be a sense of belonging to the same profession, or the same ethnicity, or the same religion. Some neighborhood public schools are so overwhelmingly Catholic, or Jewish, or Lutheran etc., in their administrative or teaching staff that they express a close kinship with neighboring religious schools. (At the neighborhood level, private schools resemble public schools drawing from the same population.) Several Title I administrators interviewed who were black or Spanish appeared particularly supportive of the non-public schools enrolling children in their Title I programs because they believed the schools were doing a good job on little money for minority children. But then, conversely, religious differences between the public school staff and private school systems can breed indifference or even hostility.

Forces outside the public bureaucracy also encourage comparable treatment of non-public school children. In some communities the operators of private schools comprise a powerful political force within the community. Members of the same church can approach 100% of the community, as in some Acadian, Old Order Amish, Zuni and other towns. We would expect political leaders in these towns to share the religious affiliation of those they represent and would expect the leaders to express a substantial political interest in treating children in the schools of the majority's church in, at the very least, an unbiased manner.

Finally, we will observe that some simply mechanical or technical procedures--adopted without intention to hinder or facilitate delivery of comparable service--strongly affect the comparability of services delivered.

B. Title I Administrative Procedures Critical to the Delivery of Comparable Services.

The manner in which Title I is implemented by the LEA, overseen by the State Education Agency (SEA), and regulated by the U.S. Office of Education, affects the equality of opportunity afforded non-public school children to receive services under the act, the comparability of services they receive, and the impact on the program for public and non-public schools. We can expect the law to force changes in the non-public schools. In some areas of school character, these changes will be comparable to those taking place in the public schools. In other areas, the administrative arrangement which imposes responsibility for the law on the public school effectively shields the non-public from some of the law's effects.

Every LEA has a different mode of politics by which it makes difficult decisions about programs and resources. In some systems, central office staff and officials have no independent political base and all power is in the hands of the principals; in others principals are little different from teachers and there is virtually no neighborhood-based political support activity. The normal way of "doing business" in a system characterizes the Title I program as well, and affects the impact Title I has on non-public schools.

To speak of an impact on non-public schools of a law that takes pains to isolate itself from affecting just those schools may seem to raise serious Constitutional difficulties. The Constitution prohibits establishment of religion, which the Court now holds to include substantial aid to schools with religious purposes. The impact we are discussing--while certainly a matter of concern to the public, since the effects may be important to our public interest--aids the schools to achieve secular goals Title I affects the educational technology they employ and, to a lesser degree their administrative structure. The Court has long recognized the states' right to intervene in both areas of private school operation by regulation, if not by grants.

In Title I, many of the effects of the law and the local implementations of it with regard to private schools are unanticipated. They are incidental to the law. Irrespective of the intention of the public school district, a certain amount of contact must take place in Title I between the public and private school authorities. A child's needs cannot be discovered without consultation with his or her teacher. Therapy cannot be prescribed without knowledge of the pedagogical approach already being followed. Title I cannot be implemented in the most effective way without knowledge of the child's daily routine, and the therapy cannot be modified without regular consultation.

All these contacts with the private schools inevitably require those schools to adjust to the needs of the public school and the needs of the program. Private schools have appointed coordinators for their system, have begun to keep and supply information on their children and staff they previously did not keep. Those which have done so are making a contribution to the federal program to help it work. Those which have not find their children do not receive the services to which they are entitled. Title I has encouraged -- in some cases required -- private schools to shuffle their administrative calendars, change the length of their school day, and alter the sequence of their programs and the type of services they deliver to non-Title I children. It is even responsible for the beginnings of centralization in the non-public school.

Comparability. If Title I were sufficiently funded, all eligible children would be aided. There would be no problem in discovering whether non-public school students were served comparably. We would simply examine whether all eligible children in non-public schools were being identified by the LEA administrators, and then served. But Title I is far from fully funded. Consequently, at a number of points in the sequence of administrative choices which must be followed before a single Title I teacher aids an eligible student, Title I officials must choose paths which eliminate some children from the services. In the language of Title I, these choices "concentrate" services on a few "target" children. So by deliberate

choice, not all children are served in public or in non-public schools. Some choices may produce a disproportionate number of participating children in one sector. (We will use the term "sector" to refer to the whole group of private schools or public schools.)

In some cases the disproportion results from an administrator's legitimate attempt to reach some program goal which is perfectly neutral to the issue of private school student participation. In some cases administrators may be attempting to increase or reduce the opportunity of non-public school students to receive Title I services. Then, too, some procedures chosen with only the needs of the public schools in mind -- with no intent to either aid or hinder non-public school students' participation--produce inequities in the opportunity afforded non-public school students.

As a result of Title I's need to concentrate services, we cannot simply evaluate the comparability of services afforded non-public school students, since many eligible non-public school students will not be served and will be deliberately and appropriately passed over. That they be treated comparably in this context means they not be passed by simply because they attend non-public schools. They must enjoy an equal opportunity to participate. But this concern cannot be separated from a concern with what is actually delivered to non-public school students.

Not a few LEA's have attempted to ensure that non-public school students have an equal chance to participate by increasing

the number of non-public school students selected, while not increasing the services they are willing to deliver to the students in the non-public school sector. The result is that many non-public school children have an equal chance to participate, but receive far fewer services than their peers in the public schools. Such incomparabilities are difficult to spot because services delivered to children in one sector may properly fail to match those given to the other since the needs of the children systematically vary.

Title I is supplemental to the regular school program. In theory, it brings greater resources to bear on basic educational problems. Most frequently, Title I concerns itself with language arts and math learning problems (but problems in any area a system deems basic may be treated). Public and private school systems already concentrate their own efforts at correcting some of these educational difficulties, but the schools may differ about which problems they will make the greatest effort to correct. By reputation, private schools make a greater effort in language arts than public schools, which in turn make greater efforts in math, the arts and practical skills (such as mechanics, home economics, business and the like). Whichever variation occurs in specific instances, the important point of our illustration is that school systems do differ in their emphasis. Title I is to serve the eligible students in their areas of greatest need. Their needs will be related to the academic areas their schools do not emphasize,

and therefore may differ between the public and private schools. The services most needed by public school students may be language skills. In such a case the LEA might deliver its services in that area exclusively, whereas the greatest need in the private sector would be for remedial math services. Comparability would require that the greatest need of students in each sector be served, and this might mean that quite different services go to students attending different schools. Because Title I is supplemental to the normal schools program, it must take into account the strengths and weaknesses of the child's basic instruction if it is to aid him or her effectively. The bottom line is the child's benefit.

But this leads to a further complication in evaluation: the needs of individual children will vary. Consider the impact on our search for a simple criteria which will readily tell us whether public and non-public children are treated comparably. Our standard includes two elements: A Title I child should be served according to his or her need, once eligibility is established according to the dual criteria of residence and academic need. The value of the services to the child should not be lessened solely because the child has enrolled in the private, or the public schools. The qualifying criteria should be neutral with respect to the sector in which children are enrolled, so that a child attending a non-public school would be as likely to be selected as he or she would be if attending public schools. Comparability

requires equal chances for selection, and equal level of treatment. The chances for selection should be equal for students experiencing comparable difficulty, and the amount of resources expended to correct the student's problems should be equally proportionate to each student's needs.

It is obviously difficult to discover an equal "chance" once chances move beyond zero. In both sectors only some of the children with identical problems will be served, and we could argue that comparability requires at least the proportion of eligibles served in each sector be the same. However, this criteria, which we have adopted with some modification, is not refined enough to permit us to know that there are no children in the private sector deprived of an opportunity to participate in Title I by actions of the LEA. The private sector is not a unified, integrated whole in any sense. It is simply the negative of the public sector. There may be systematic biases in the selection of students within that sector, even though the overall proportions are comparable to the public school sector's. Practically speaking, children at some private schools may not be eligible at all because of the type of private school they are attending. (As we shall see, there are neutral reasons why children at some private school may not be served, though they meet all eligibility criteria, but the same reasons would apply in the public schools.)

Discovering comparability in resources is an even greater problem. Because the needs of children vary, Title I

will normally and properly devote different amounts of resources to them. Some children need programs of physical and psychological services in addition to therapy in language arts and math; others have problems remedied simply by a brief period of math exercises. As the problems differ, so will the amount of resources each should properly receive. Some Title I programs do not follow this pattern, and provide standardized offerings to all children. The best that can be said for this approach from the point of view of the non-public school child is that he or she is equally inadequately treated. Other districts provide each participant with the services he or she needs. One student may require only remedial math work, at a cost to Title I of \$600 per year, and another services in math and language, counselling and corrective physical therapy (e.g., eye therapy) costing \$3,000. The two students would be treated comparably, however, since each was treated according to his or her need.

The problem for evaluating comparability arises when more of the children needing the larger amount of services are in one system than in the other. We would normally regard a showing of unequal per pupil expenditures as a sign of bias, but in this case unequal expenditures would be the proper condition; equal expenditures would be a sign of bias.

In the course of this study of LEA practices, we have found systems which gave only reading materials to non-public school children, but delivered extensive diagnostic and therapeutic services to the public school children, and other

therapeutic services to the public school children, and other systems which assigned three times as many non-public Title I teachers to a Title I teacher as they did public school children. In both cases a lower proportion of eligible children in the non-public schools were eligible, and some factors caused the LEA's to find fewer private school children eligible than should have been found so. In these cases the non-public school children are obviously disadvantaged, a fact recognized by the LEA's themselves, and one they attempted to remedy but regarded as essentially due to consequences beyond their control. We can know there is bias present because we can see from examining the systems' procedures that each limits the amount of services it is willing to provide to individual students solely because they attend non-public schools.

In coming to such conclusions we must be extremely careful, for a system can legitimately decide to spread its services farther, and not devote inordinant amounts to the children with the most severe--and therefore least readily correctable--problems, and a system can make such decisions for subsections of its program. Hence, a system could spend twice per pupil in the non-public sector, as New York does, but serve only half the proportion of eligible students, and be providing comparable services.

Per pupil expenditure comparisons are important, and when we find inequalities we are alerted that there may be biases, but the disproportion is insufficient evidence, and we must examine the LEA's rules and procedures that produce the

discrepancies. In addition a limited qualitative evaluation of services is necessary, since comparability requires that services be equivalently appropriate to the students' needs in each sector. In some cases the non-public school students in Title I programs have been served by only the youngest and least experienced teachers in the system, or have been relatively systematically assigned the least able teacher in randomly selected groups of 4 or 5 Title I teachers, but this sort of qualitative difference is relatively easy to discover. More difficult are differences due to carelessness in planning for the needs of the non-public school students as compared to the public's, and these can only be discovered by careful review of how the planning for basic program objectives was carried out, and subsequently how the later planning to implement the program was performed.

To summarize the problem of reviewing comparability: the procedures followed by the LEA and the standards devised and applied at several key points in the administrative sequence affect the number of children eligible and participating. In evaluating comparability, we must examine these procedures carefully. A review of procedures must precede a review of the statistics on participation themselves, since the statistics already reflect the procedures. The procedures define who is eligible, and bias may be introduced by that very definition. And the procedures identify who should participate, and how many participants there will be, and--whatever the relative proportions of participants in

each sector--may be unfairly biasing the chances of participants. A review of procedures will provide us with a means of interpreting the statistics on participation. It may show there to be bias in the administration of the program which needs to be corrected. It may even show bias that is not apparent in the statistics. But it may show striking disproportions if we find the statistics to be the product of appropriate administrative decisions directed at legitimate Title I objectives, and that the disproportions do not reflect any lessened chances for non-public school children to participate in Title I.

In sum, the approach of the LEA's should be measured by a simple rule: Non-public school students should have the same opportunity to receive Title I services they would if they were attending the public schools, and the intensity and quality of the services they receive should be equivalently proportionate to their needs. The quantity and quality of services they receive should not diminish because they attend non-public schools.

Other issues affecting comparability. The comparability is also affected by programs which take money "off-the-top" of the Title I budget, but do not include non-public school students, and by the assessment of charges against pupil allotments for overhead services not delivered to non-public school students. LEA's may deliver comparable services to non-public school students in the on-site portions of their elementary, middle

and secondary programs, but have other programs which do not include non-public school students. Notable examples of the latter are early childhood education centers, and special centralized high school centers. In some cases these programs have been very large, absorbing as much as 33% of Title I funds, and thereby reducing the amount of funding available to support services that are given to non-public school students. In some cases, the federal funds are used to begin programs which have the effect of capturing for the public system some of the students who would normally have attended the non-public school by beginning a sequence of highly concentrated services at age three.

The question of whether non-public school children are actually disadvantaged by the practice is not clear. Non-public school children are treated in the same way as public, in that neither at the elementary level are supported by the funds. But it would be possible for a district to use all its funds for pre-school children, for example, and provide no services to non-public school children. Are non-public school pre-school aged children disadvantaged? Are they, even if the non-public school offers no pre-school program of its own? Should pre-school experiments carried out at public school site--and totally a heavily funded by Title I--be available at non-public school sites?

LEA's may also reduce the value of services to be delivered to private school children in order to pay for central services which the LEA does not provide to the non-public

school sector. The appropriateness of this practice is also unclear. On the one hand the charges may be legitimate program costs. On the other, perhaps the service should be provided.

Comparability is greatly affected by the attitude of the non-public schools themselves. Many inner city non-public schools are afraid of becoming involved in a federal program, and refuse to provide the LEA with information about the residence, academic attainments and needs of their children, and refuse to adjust their schedules to accommodate the Title I program, and refuse to provide the Title I program with classroom space. But most public school attitudes appear heavily affected by the private school administrator's typical ignorance of the Title I program, and of what "participation" in it involves. Few who are not involved have a clear idea of what is done in Title I.

Title I is a voluntary program, and there is no requirement that children participate in it. But it is children who are eligible, not schools, and it is up to the parents to decline, not private school administrators. LEA's typically do not ask parents if they have a desire to participate when the non-public school indicates that it is willing to cooperate in the program. LEA's typically rely on non-public schools for a number of resources and aids. They use classroom space furnished by the non-public schools (in some instances, Title I rents mobile or on-site classroom space, but more often Title I programs will not be delivered to the non-public school students when the non-public school is unable to furnish a

site). They use the results of non-public school provided standardized testing, and do not give services to students whose schools either do not test, or do not furnish test results. They use non-public school clerical services to identify those students residing within the target areas, and in some cases to identify those students falling within the academic cut-offs for eligibility. And the LEA employs the services of the non-public school principal and classroom teacher as consultants and administrators, to arrange the class day of all students so that the Title I program can be included with a minimum of disruption, insuring the Title I services do not supplant the school offered services in math and language arts, and aiding the Title I staff to build an effective program. For a variety of reasons, a proportion of private schools refuse to participate in Title I. But these schools are not powered by law to remove their students from the benefits of the Title I program. They may decide not to cooperate and their decision will lower the potential quality of the program for their students if for no other reason than the program costs will escalate and coordination with the regular school program will be difficult. But LEA's have a responsibility to the target area children that can only be satisfied by making services directly available to the students of uncooperative schools. (We should note that the problem of uncooperative local schools is not restricted to the private schools. In some districts, local public schools, too, refuse to cooperate with the Title I program, and refuse thereby the program

for their students.)*

OTHER AREAS OF EVALUATION

The Title I program necessarily will have an impact on the non-public school, since the program places a public school teacher on the non-public school site, requires some adjustments in the school calendar and daily program to accommodate "pull-out" approaches, and requires that the principal and regular classroom teacher regularly communicate with the Title I teacher to coordinate Title I's special classes with the school's regular instructional program. The placement of the public school employees at the private school site may create some problems for the private school in its own staff. Title I teachers are typically paid two to three times the salary of the private school's own teachers, for shorter working days and much smaller class loads, and do not share non-teaching duties at the school. In a few cases, these benefits have caused contention.

* In California, by SEA requirement, site cooperation is part of the regulations. The principal of each school—public or private—must produce an acceptable Title I proposal for his or her site, or the school will not be allocated Title I services. Any school that does not wish to participate simply does not submit an adequate plan. Title I's agreement with the local school in withdrawing the program unfairly eliminates the school's students from the opportunity to receive Title I services, and the Title I staff ought to oppose the school's move. But as a practical matter the Title I staffs often permit the withdrawal since other schools are eager for the extra services, and since it is difficult for a program to succeed in a hostile environment.

On the other hand, the program appears to have had many beneficial effects on both public and private schools. By report, the public schools have gradually learned to respect the work of the private schools in their vicinity, and the private schools to treat the public with less suspicion. Our interviewee often commented that in the course of the past ten years, the two sectors had come to understand each other's problems and to work together. The program has reoriented the attention of many private school administrators and teachers to the problems of the poor learners in their inner-city schools. It has been especially helpful in introducing new approaches to teaching inner-city children into the private school setting. The program, in this respect, is most like the old Department of Agriculture County-Agent program. In some cases, whole systems of private schools have adopted innovations whose effectiveness was demonstrated by Title I. For example, the Lutheran system has taken the counselling approach, proven effective in treating many educational problems of its inner city school into the schools serving wealthier populations. Various Catholic dioceses report similar experiences. And several individual schools reported that the Title I teacher's pride in her classroom, evident in her use of educational displays and decorations, was imitated by the school's regular staff.

Chapter 3

NATIONAL SURVEY DATA SHOWS BIAS

Before we examine in detail the points during the administration of Title I programs that are problematic for the equitable treatment of eligible private school students, we will examine national data which shows that the problem does exist.

ANALYSIS OF NIE NATIONAL DISTRICT SURVEY DATA

It is difficult to know if the approaches followed by LEAs for including private school children are biased because neither the Office of Education nor the states collect and tabulate sufficient information to make any determination. Many states do not even tabulate the number of non-public school children served. Only a few make consistent efforts to determine that an appropriate proportion of the children in the non-public sector are included.

Broadly speaking, the evidence suggests that children enrolled in non-public schools (1) have less chance to participate in Title I than they would have if enrolled in the public schools; (2) when they do participate, receive far fewer services than their public school counterparts. But no information collected by any state education agency is adequate to the task of certifying that such bias does or does not exist. Although the little information collected by state offices suggests that Title I services to non-public school

students are not adequate, certain circumstances could explain the statistics.

To obtain better information, NIE took two approaches. It developed a national sample of 100 school districts and queried them about the quantity and quality of services they deliver to non-public school students. This survey established the approximate numbers of non-public school students involved in Title I programs and the average number of instruction hours they receive. It established the proportion of public and non-public school students receiving Title I services.

BIAS IN SELECTION OF STUDENTS

In its national survey, NIE found that 116,218 non-public school students receive some form of Title I services; they represent about 4% of all private school students living within districts receiving Title I funds. However, only 43% of the districts that have private school children living within their boundaries serve any private school children in their Title I program.

These enrollment figures suggest that the Title I program is not meeting the needs of private school children. Most of the participation of private school children in Title I is accounted for by programs at a few sites. For example, 14% of all non-public school children enrolled in Title I attend New York City private schools, even though only 4% of all private school children reside in the city. (Of all the cities

surveyed, New York City has the most objective and standardized procedures for including non-public school children.)

Only 2% of the students served in Title I programs are enrolled in non-public school, even though 11% of U.S. elementary school students are in non-public schools. While it is true that proportionately fewer low-income families enroll their children in private schools, even this factor is not sufficient to explain the small number of private school students in Title I.

NIE found that 29% of all public school elementary students were eligible and approximately 19% were served by Title I programs. It found that 4% of the non-public school population in Title I districts was served, suggesting that 6% were eligible. *More should have been found eligible and more served.* In almost every city we studied in detail, we found a higher proportion of non-public school children eligible. New York City has a typical non-public school population, except that it has more students in elite academics: 14% of its non-public school population is eligible for Title I, but 7% of its non-public school students are served.

NIE's survey found that only about 50% of the children in target-area schools were academically eligible for Title I services and that the eligible list included children who resided in the target area, but were not from low-income families. In 1975, 31% of the public school population had family incomes below \$5,000 (in constant 1967 dollars). Not

all these children will reside within target areas nor be academically eligible. The targets areas are, however, a function of family income and reflect lower-income residence patterns. Most Title I eligible students will be drawn from families with incomes under \$7,500 (in 1967) dollars).

Of the 3,220,000 students enrolled in private elementary schools in 1975, about 35% had family incomes under \$7,500 (constant 1967 dollars) compared to 52% for public schools.* In the Northeast and Central states, 11% of all children with family incomes below \$7,500 attend private schools. These figures are very close to the New York City proportions, which show that 12% of the children residing in its target areas attend private schools. In sum, a \$7,500 family income appears to be a reasonable indicator of Title I target-area residence. Applying known rates of participation, the indicator would predict 5.1 million elementary public school participants. (NIE's sample finds 5.9 million, suggesting the indicator is conservative.) Applied to the non-public school population, the indicator predicts 245,460, suggesting that only 47% of these students who should be served are served.

Let us examine this reasoning in more detail. We estimate that less than half the non-public school students who should receive Title I services are receiving them and that these students receive only a fraction of the services they should.

* *Condition of Education*, 1977, pp. 74, 75, 190.

We are forced to make estimates because the statistical information supplied by almost all LEAs reflects only those students the districts counted as eligible, and our case studies have often found these counts to be in gross error. Because an LEA frequently does not take the many steps necessary to find an eligible non-public school student, a district's statistics on non-public school participation do not provide a good basis for evaluating the number of eligible non-public school students, the proportion of eligibles served, or the quality of services delivered. We are now conducting studies to establish these figures for districts that have a substantial proportion of non-public school students living within their boundaries.

NIE's district survey has provided baseline data from which we may calculate an approximate number of non-public school students who should be participating in Title I. From that survey we know, for the entire federal program: (1) the total number of public school pupils served; (2) the average rate of eligibility for public school target-area residents; (3) estimates of the average rate of eligibility for non-public school target-area residents; and (4) the percent of eligibles served in public schools. In addition, from NCES data, we know the total numbers of public and non-public elementary school students and the proportion of each with 1975 family incomes below \$5,000 and \$7,500 (in constant 1967 dollars). In our calculation we are making an important, but reasonable, assumption that there is a relationship between a student's

family income and his likelihood of residing within a target area. The target areas are defined as school attendance areas with above-average numbers or proportions of low-income families within their bounds. What family-income level accounts for the largest proportion of Title I target-area residents?

We know that 29% of all public elementary school children are eligible by the dual criteria of residence and academic need, and that only 50% of the children in target-area schools are eligible after the application of the academic criteria. We also know that 13% of all public elementary school children are members of families with incomes of \$5,000 or less. So if we set the threshold at \$5,000 and apply the 50% average eligibility rule for target-area residents, we would find only about 15% of all public school children eligible, about half the number we know are actually eligible. Clearly, the threshold should be set above \$5,000.

Because target areas are defined as having an above-average number of low-income children, they will, of necessity, have children from higher-income groups. We are making the reasonable assumption, subject to exceptions in some localities, that the lower a family's income (above \$5,000) the more likely it is to live in proximity to the lower-income families whose residences, by formula, define the target areas. Hence, a family with a \$6,000 income is more likely to live in the target area than one with a \$7,000, and the \$7,000 more

likely than one with an \$8,000, and so on.

Fifty-two percent of all public elementary school students come from families with incomes of \$7,500 or less. This is close to the number of public school students living within target areas, approximately 58% of all such students. The \$7,500 family-income threshold is an approximate and clearly conservative indicator of target-area residence, especially for our purposes. Private school children are more likely to come from families with slightly higher incomes than public, even in target areas where all the children are from lower-income families. Therefore, to the extent that the threshold figure is too low, it will lower our estimates of the number of non-public school children who should be served. Thirty-five percent of all non-public elementary school children come from families with incomes of \$7,500 or less. A proportionate number of children living in target areas, from both public and private schools, should be served in Title I, with one exception.

NIE's survey of administrators established that approximately 50% of public school target-area residents were academically eligible. The proportion of non-public school children would not be as high for a number of reasons:

1. The private schools have a reputation for higher achievement rates in inner-city areas and attract parents of more academically ambitious children.
2. Inner-city private schools spend more time on

educational basics.

3. Inner-city private school children score higher on the achievement tests used for Title I eligibility, especially at the upper-elementary levels.

New York City has found that about 33% of the private school children known to be resident in target areas, and tested for eligibility, qualify academically for Title I services. We will use this proportion in calculating the number who should be served nationally (see table below).

Finally, NIE's study found that 66% of all eligibles were served. Applying these proportions, we find there should have been 245,460 non-public elementary school children served in Title I, whereas NIE's survey found only 116,218 served. Thus only 47% of those who should be served are served.

ESTIMATES OF THE NUMBER OF PUBLIC AND NON-PUBLIC SCHOOL CHILDREN SERVED BY TITLE I, BASED ON FAMILY INCOME OF THE STUDENT AND TITLE I PROGRAM INFORMATION, 1975

	Students Enrolled	Students in Families under \$7,500 Income	Eligible Residents	Participants Estimate (66% of Eligibles)	Participants NIE Count
Public	30,256,000	52% 15,733,000	50% 7,866,500	5,191,890	5,900,000
Private	3,220,000	35% 1,127,000	33% 371,910	245,460	116,218

Note: All figures in these calculations are for 1975, but dollar amounts have been translated into 1967 dollars, as reported in Mary A. Goady for the National Center for Education Statistics, *The Condition of Education, 1977*, GPO 017-080-01678-8, pp. 74-75, 190-191.

*New York City's lower rate of academic eligibility of non-public school children was used in calculating national rates of participation.

BIAS IN QUALITY OF SERVICES DELIVERED

We should expect greater proportions on non-public school children to be served than we have found. But the NIE survey uncovered even more striking evidence of possible trouble for non-public school children in the program. The survey showed that public school children received an average of about 5 hours and 30 minutes of compensatory instruction per week in the public school, equal to about 20%-25% of instructional time.* Non-public school children received an average of one hour in compensatory services per week.

Differences in the amount of services delivered could be related to the actual needs of the students—non-public school students receiving only 18% of the services given public school students because they needed that much less. But that explanation would require that non-public school students identified as eligible for the program on academic grounds were, for some systematic reason, much better off academically than public school students meeting the same objective criteria—an unlikely case. Further, an average of one hour of services a week means that many non-public school students receive only a few minutes of Title I attention each week, even though they are counted as participants in the program.

The low level of services provided stretches the dividing line between participants and nonparticipants. It appears that

* CES Report, p. 23

many non-public school students listed as participants do not in fact participate. But caution: The measure of total weekly hours of instruction may be imprecise.

Chapter 4

EXAMINATION OF THE KEY POINTS IN PROCEDURES FOR INCLUDING PRIVATE SCHOOL STUDENTS IN TITLE I

Because national survey data indicated major problems with administration of Title I, we designed our series of interviews with state and local education agencies to try to identify the troublesome administrative practices. The first section of this chapter identifies key points which determine the equity of the program for private school students. In Chapter 5 we will examine our survey findings in greater detail.

KEY POINTS IN PROCEDURES

There are several points at which Title I administrators must make decisions that affect either the opportunity given private school students to participate in the Title I program or the quality of the services private school children will receive. These key points include:

- Identification of the target areas.
- Assessment of student needs and related decisions about program objectives.
- Identification of eligibles attending non-public schools.
- Testing for academic eligibility.
- Identification of participating public schools.
- Allocation of resources to Title I delivery sites, public and non-public.
- Planning for specific program of service delivery.
- Selection of Title I teachers.
- Management of Title I teachers and aides.
- Selection of participating students.
- Program evaluation.
- Operation of the Parent and the District Advisory Committees.

Choices must be made in every area, and every choice affects the comparability of the treatment of non-public school students.

THE IDENTIFICATION OF THE TARGET AREAS..

Title I recognizes as a desirable public policy the attempt to reduce the effects of a lower-income environment on the academic attainments of children. Title I funds are distributed to states and localities according to a formula related to the size of the lower-income population. The present formula provides a per pupil allotment based on the total number of children of school age residing in families with incomes below a poverty level (Orshansky formula), added to two-thirds the number of children in families receiving AFDC allotments. In the initial allotment to each LEA, all children meeting the criteria are counted, whatever the school of attendance. There is no bias on the part of the federal government against districts enrolling high portions of the students in non-public schools, nor even against districts with high proportions of school drop-outs. The public system receives money for all eligible children.

But the federal government distributes insufficient money to serve all children in such families, and so the money must be concentrated. Furthermore, the designers of the Title I law chose not to require districts to obtain information on the economic circumstances of each child before the child could be considered eligible, thereby avoiding placing an onerous burden on the public schools, and satisfying those who were concerned that the law would further increase the amount of sensitive private information the government would collect on

individuals. The approach has the advantage of being theoretically more appropriate since it is not the precise income which causes the child's academic difficulties but rather the environment in which he or she lives, best measured by the income of his or her neighborhood. Title I requires districts to concentrate Title I funds in the economically most impoverished sectors of the community.

The Title I law assumes neighborhood school districting, and this has caused some difficulties for school systems implementing extensive busing programs to achieve economic and racial integration, or for districts with specialized, voluntarily-chosen public schools. According to Title I, school districts are to rank each of their schools by the level of lower income impact in each, and serve only those schools which are below the district-wide average. Hence, in each district the LEA will be serving the children from the most impoverished areas.

Note, however, that the impoverishment is relative to the district's economic character as a whole, so that there will be great variations in the economic levels of Title I target areas from district to district. Children excluded in many central city district would be included in suburban districts in the same areas.

LEA's are permitted to identify economically qualifying schools by choosing any appropriate economic indices and using it to characterize the public school population, or the entire school-age population of the attendance area of the school.

private schools (since the initial reluctance often coincides with a reluctance to become involved with governmental services and agencies, and that reluctance carries over into other areas) the problem of their under-identification may strike (the private school disproportionately).

The problem is not at all unusual, and is experienced in most large communities. For example, some cities with large Chinese immigrant populations found that their "Chinatown" area schools were not eligible for Title I (and consequently the private school children from the same areas not eligible) because the immigrant families were reluctant to enroll for public assistance for legal reasons. No family on public assistance can sponsor a new immigrant according to the immigration regulations. So despite the fact that incomes of the families are low enough to meet the criteria, because the families are still bringing family members in from the homeland, the families do not enroll, the school attendance areas are identified as Title I target areas, and the children are not eligible to receive Title I, despite manifest need. Children in such areas attending private schools are, of course, also ineligible as a consequence.

With other ethnic communities, matters may not be as extreme but the general principal holds that the families of children in private schools are frequently more reluctant to give the economic information that would permit the schools to identify the attendance area in which they live as Title I.

eligible. The school lunch program requires detailed revelations of family income before a child is eligible for a free school lunch, and many districts rely solely on free-lunch data; or on free lunch data in combination with AFDC counts, to identify target areas. In addition to family cultural preferences against the revelation of family, and against participation in government programs which establish a type of dependency, other simple and extraordinary factors can inhibit the participation of specific ethnic groups. In some instances French and Caribbean children in Mid-Atlantic and New England states do not like the kind of food provided by their school systems in the free lunch program, and do not register for the free lunches. Consequently, their schools will not rank high among those eligible, and they may not be served.

Title I' dependence on data from programs in which parents voluntarily enroll their children may lead to some problems. In one large city, until the criteria was changed from free lunches delivered to the public schools to free lunch eligibles, principals were ordering larger number of free lunches which were thrown out because the children refused to eat them. Because the documentation of free lunch eligibility in poverty areas is often poor, the presumption of eligibility being so strong, principals were often able to order far more free lunches than their schools were eligible to receive which insured the priority of their schools in the Title I ranking of eligible schools. Not to order the lunches would deprive the school of its Title I program.

In some areas, lower-income ethnic groups concentrate in the private schools, so that an examination of the income characteristics of the public schools would not reveal the poverty-impaction in the area. Such circumstances frequently occur in Mexican-American areas, where the children of the barrio may concentrate in the private schools. Public schools may split a lower income area among several schools and even among several school systems, so that none of the schools attendance districts reveal, in their statistics, that they include a low income area. The private school serving such an area may be serving a totally lower-income population.

Target Areas and School Desegregation. One of the most difficult matters for Title I is the consequences of integration programs on Title I districting. All integration programs share the common feature of assigning children to schools different from the ones to which they were originally assigned. The reassignment may be to schools voluntarily chosen by the student's parents, and one eastern city has gone so far as to permit its students to choose to attend public or private schools in suburban areas with the central system picking up both tuition and transportation expense. More commonly, districts reassign students within their own boundaries to give a racial balance to their schools. By far the most common manner of reassignment is to employ what some districts call "geo-codes," block-like areas added together to define a school attendance district. Planners divide the community into a

residential area and obtain racial census information for each area. Then the residential areas close to what used to be the neighborhood school are assigned to that school, and to each of these residential areas is matched another, from a different area, populated by a different race. The attendance area of a school will then be composed of a few neighborhood blocks close to the school, sharing the racial characteristics of the neighborhood, and other residential areas elsewhere which will give the school population a racial mixture. The new attendance boundaries are built up of contiguous and "scatter site" residential areas. In the most highly developed plans, children from wealthier majority neighborhoods are "redistributed" into some of the inner city schools, and children from the inner city into the outlying schools.

In a typical case, a minority inner city school will lose some of the blocks normally assigned to it, and the children from those blocks will be bussed to a more purely white school; in their place the inner-city school will have assigned to it blocks of students from more affluent, more majority neighborhoods. In such cases, the Title I target area become the scatter site attendance area of the school.

Title I regulation require that schools be ranked according to some poverty index, and it is the clear intention of the law to use the school poverty ranking as a proxy for a direct measure of low-income environment in the neighborhood, since the purpose of the law is to overcome the handicap imposed by the low income environment on children's academic

attainments. But scatter site neighborhood schools no longer represents a contiguous neighborhood and is likely to include a mixture of both wealthy and poor blocks in all cases. The consequence can be severe for children who actually reside in the lower income area. Children bussed to outlying schools to integrate them may find that their new school does not qualify as a school in the target area because it is too wealthy, and that they will not receive services they would have received had there been no integration. Blocks in outlying areas assigned to inner-city schools become "target areas" as long as the new population characteristics of the target area schools receiving the affluent students, does not force them off the eligibility list.

Hence, certain sections of the wealthier, majority neighborhoods which prior to integration were not eligible become eligible because the children in them now attend -- or at least are assigned to -- a Title I target school, whereas the blocks in the inner-city area which before had been identified as Title I target areas lose that designation, since the children living in them are now assigned to more upper-income schools which are not target area schools.

The experience in a number of integrating cities suggests that many of the children reassigned from the wealthier schools to the inner-city schools do not attend, but are sent by their parents to private schools or to suburban schools beyond the reach of the central city school system. Nevertheless, the neighborhoods in which they reside are target areas,

and all children living in them, including those being sent to the suburban public schools, are eligible. Title I eligibility has nothing to do with family income of the eligible child, and depends on area of residence alone.

It has even occurred that so many low income children have been reassigned to schools in wealthy neighborhoods that the wealthy school has become the target area, at the expense of inner-city public schools. In one western city, so extensive is the bussing program that a public school in the wealthiest neighborhood of the city is high on the list of target schools. So children from wealthier neighborhoods, who are not disadvantaged by the environment of poverty, but who are not attaining at average rates of progress, will replace the inner city children excluded from the program.

In addition, children from the wealthier neighborhoods now reassigned to the inner-city schools which retain their target-area designation will also be eligible for the program and replace some portion of students who had been eligible prior to integration.

Non-public school children are affected by the integration programs. Some blocks of inner-city areas, formerly Title I target areas because they were lower-income, will no longer be target areas, even though their income levels have not changed. The children residing in them, and attending non-public schools are no longer eligible for Title I services. Some blocks in wealthier neighborhoods, which have been reassigned to inner-city target schools, will be target areas in

their place, and the non-public school children in them entitled to services.

The identification as target areas of blocks in wealthier sections of the community may increase the number of eligible non-public school children, since it is generally the case that the higher the income group, the greater the percentage of children in non-public schools.* The problem is one perceived in the private sector as misallocation of program resources to the detriment of the children most in need of the services. When the children from the wealthier neighborhoods are bussed into the inner city schools, the schools receive extra services which benefit all children in them, even if the school loses its Title I target area designation. When formerly target area children are bussed out into wealthier schools and lose Title I eligibility because their new schools are too wealthy, the neighborhoods in which they reside lose target designation. The bussed children themselves receive some compensations for their loss of Title I. They are attending reputedly better schools in wealthier communities, and enjoying superior resources such schools have built up over the years--resources not necessarily reflected in either current operating costs per school, or in overall capital investments per

*attendance at non-public schools is affected by so many variable -- not in the least being availability of the schools -- that even this loose generalization should be accepted with caution. In any community the trend might be precisely opposite. For example, the median income of families with children in private school in New York State is lower than for those in public school.

school, and so not readily quantifiable. Integration provides them with a palpable education benefit, at least in theory

But the private school children remain in the impoverished environment, lose their Title I eligibility, and receive no compensating resources.

Scatter site attendance districtings removal from the target area of blocks in the most impoverished sections of the community formerly included may have a mushrooming effect disabling private school children from participating in the program. In general, private school children are served only if they are sufficient numbers eligible at a school to warrant placing Title I resources there. A Threshold number of students is necessary. The private school must become a site before any eligible student attending it may be served. If the loss of designation as a target area of a portion of the private school's "attendance area" reduces the number of eligible children the school enrolls below the necessary minimum, all remaining eligible children will also be deprived of the services. It is more likely for private schools to lose their site designation than the public because they are generally smaller schools. They may obtain site designation even if a higher proportion of their children academically qualify, as compared to the public schools in their area, because their numbers are too low.

School Attendance Area and Title I Target Area Incomparability. One important source of incomparability is introduced into Title I by the manner in which the dimensions of the

target area are defined. Title I regulations tie the target area to the attendance district of a public school. Presumably the most important reason for choosing the approach of entitling the entire attendance area of a public school was to permit the school to treat the most severe problems of its neediest students. It is reasonable to select for treatment the most severe academic problems experienced by children of the same school, and unreasonable to remove children from consideration because they do not live within the proper bound. The approach solves this problem in most cases, but becomes unreasonable, given the intent of the present law, when it includes children whose academic problems are unrelated to a low-income background. This occurs in public schools when systems have extensively integrated.

Tying the target area solely to the public school attendance area causes difficulties for the program in non-public schools. When sited at these schools, the program experiences just the problems the public schools were trying to avoid by adopting school-neighborhood targeting, and the problem is actually exacerbated because of the kind of accidental gerrymandering of low-income areas that takes place for the reasons having to do with the poverty data employed that we discussed above. The problem is not limited to simply the fact that the most academically needy children in private schools will often be excluded because of their residence from eligibility. As we shall discuss, may districts allocate resources to schools on the basis of the

numbers of eligibles at that site so the quality of services delivered to eligible children selected as participants is also affected by the approach. In fact, the difference in eligibility base for schools in the two sectors appears to cause the most severe problems of comparability of treatment of public and private school children as we have found.

It might be argued that the adoption of a more "natural" territorial base for the target area, cutting direct connection with the public school attendance district boundaries, would not solve the problems for the private schools, but would in turn create problems for the public. But there are two considerations which suggest the approach would be worthwhile. If Title I funds are in fact being delivered to the sites and students the law intended under the present approach, there is no reason to believe these would be missed in any newer approach. On the contrary, we know the present approach is underassessing problems for some public schools and some ethnic groups. The strictly territorial approach should remedy that problem. Furthermore, the new approach would be much simpler to implement. Currently, the identification of precisely which schools are most economically impacted, and in what order, consumes great amount of district energies. (And the precision is often just a chimera, since the basic indices themselves are not that good for fully identifying the problem.) The new approach would treat non-public school children more fairly.

Even if the new approach did cause school districts the same sort of problems in their public school sites they

now experience in their private school sites, it would still be worth adopting. We can presume the districts would adopt procedures to solve the problems of missallocations and mis-identification in the most equitable fashion. They have not moved to correct these problems in the portion of their program affecting only non-public school children at the present time.

State Compensatory Education Programs and Title I Target Areas and Needs Assessment. The better a public school

district plans to integrate all its supplementary programs for the greatest impact on the educational problems of its students, the greater the difficulty for the LEA Title I program of delivering a comparable, or even merely the most appropriate, program of services to the non-public school students. Fourteen states have adopted state compensatory education programs which supplement the federal program, and states and districts fund numerous other special programs which duplicate, supplement or complement parts of the activities supported in Title I programs. Most districts coordinate their various programs for greatest effectiveness. Some coordination is inevitable since the districts themselves design the objectives and activities they will perform under Title I and under most state compensatory programs.

State programs generally take an "instructional aid" not a "child benefit" approach. They provide districts with restricted aid, funds which may be expended only for legislatively defined purposes and activities. In only four state

programs are non-public school children served. State legislatures appear bound to the district-aid approach, and when desiring to support private school students, have tended to attempt to include private schools in their program in a comparable manner. The Supreme Court has frequently struck down such state aid efforts as aiding religions.

The state with the best developed supplementary programs have in recent years concentrated efforts at improving planning and accountability at the district levels. Some state offices of education have developed quite effective techniques for encouraging or even requiring local districts to undertake comprehensive planning of the educational needs their students have and to discover the best and most efficient way of implementing the dozens of categorical programs available to them. States with compensatory education programs of their own are the most active in encouraging and overseeing such integrative planning.

California appears to have the largest, most precisely defined compensatory education program, and a state board of education has itself taken the lead in requiring local districts to implement planning and accountability management approaches. Its program will illustrate the difficulties posed for non-public school children eligible for Title I by similar state and local programs.

California's state compensatory education program does not significantly differ from the federal program in its design or funding. The state compensatory education program delivers

approximately the same services to the same population as the federal program. The state board of education has expressed concern that the large amounts of extra funding provided be spent in such a way that results can be measured, and has required that LEA's spend at least \$550 per pupil served with auxilliary services. The districts are able to serve the needs of most target area children at this level from the combination of local, state and federal funds.

In the past, the state permitted each district to design their state and federal compensatory programs together, so that the target area was the same for both programs, the services identical, and so on. In a simplified view, the state program simply added more resources to the Title I programs designed by the LEA's. Each target area school in the public system provides the SEA with an integrated plan for the use of the supplementary funds it would receive from all sources, state, local and federal. Because of the large amounts of supplementary funds from several programs included on the integrated planning documents, it was possible to serve the children with the greatest need at all schools within the target area, at the \$550 minimum level. Each child would receive some federal resources and some state resources, but the allocations were not clearly separated. Title I might support the reading instructor in one school, but state funds in another. Such variations could occur even for students in the same program in the same school.

The variations made no practical difference, so far as the students were concerned, but did complicate the task of

isolating and measuring the effects of the federal or state programs. In general, state compensatory education funds permitted the federal funds to be spread further and concentrated on the most academically deficient children in the public schools, because the complementing state funds would support services to less deficient children in those schools, or would support some of the more luxurious aspects of the program of aid. Luxurious is used in a sense opposed to "basic". At a lower level of funding many of the activities required by the state in Title I would be dropped in favor of more basic instruction.

The California state education office has adopted rules which insure that the large amounts of supplemental funds produce an integrated and complementary impact. But only Title I funds are available to the LEA to meet the problems of non-public school children. The Title I programs designed for those children do not substantially differ from those designed for the public schools, except that the level of resources available per child is much smaller. Decisions have been made in the public sector with large amounts of resources in mind, but only smaller amounts are available to take care of the needs of the non-public school children. The decisions are inappropriate for the private school children.

A federal district court case from Oakland, Alexander vs Califano (1977), will further dramatically affect the fortunes of the non-public school children if any of the rules proposed at the federal district level are adopted elsewhere.

The court considered whether the integrated planning requirement, by which federal funds were blended with state funds at the school level, met the federal requirement that Title I funds be strictly supplementary, and not used to supplant local funds. To implement the rule, the federal government requires that target area schools have been allocated at least as much per pupil resources as non-target schools before any federal resources can be allocated. The court ruled that Title I money must be kept identifiably separate from the state funds, and could only be disbursed to schools after the state funds -- principally the state compensatory education funds -- were disbursed. The state funds would be given to aid the children in the most impoverished schools following its own guidelines, and then Title I funds would be allocated to the remaining schools on the eligible list.

Non-public school children are only eligible if they reside in an attendance area being served by Title I in California. The court's approach would mean that the most impoverished neighborhoods served by private schools would not be in Title I target areas, but rather in state compensatory education areas. State services would not be available to the private school children living in the most impoverished areas.

A variant of the court's approach is much more commonly found in districts. Federal Title I funds are expended first, to take care of the neediest cases in the poorest parts of the community. Then state funds are used to take care of academi-

cally needy children in other, less impoverished schools. Only the private school children in the neediest (Title I) schools will be served. However, the public system will have made many decisions about the proper balance of services it should provide: every time the system provides an additional increment of service to a participating student, it cuts out another student for whom there will be insufficient resources remaining. The system must weigh the higher level of disability that will go untreated in those cut out of the program. The balance is obviously a delicate one, and is struck by the system in full consideration of the resources that will go to those students excluded from the Title I program. If a state program provides precisely the same services to students left out of the federal program, the planners will be more willing to concentrate services in the federal program for greatest impact, even if that spreads the services narrowly, since the state program will aid those excluded from the federal by the concentration decision. Unfortunately for the non-public school child, this state of affairs produces unbalanced decisions, since only a fraction of the resources which weighed in the equation are available to their needs, and because there are no other programs to cover the needs of children cut out of the federal program.

In either case, whether federal funds be expended first or second, the requirement that the funds be separated shrinks the Title I target area, with dramatic repercussions for the

non-public school children. To shrink the target area shrinks the number of non-public school children eligible for Title I. California allocates its Title I resources to each school in the public and non-public sector on the basis of the number of eligible in it: hence the entire Title I fund of resources for non-public school children is determined by the number of eligibles found. The smaller the target area, the fewer the eligibles; the smaller the pot of funds and the fewer who can participate, and the lower the amount of service which can be furnished them. Technically speaking, the circumstances are the same for the public school children so far as Title I is concerned, but the consequences are different, since those children are provided with state compensatory education services.

Title I is planned in some states as a component of an overall approach to remedial problems, but only a portion of that approach is available to the private school children. To the extent that the system has succeeded in tightly integrating its auxiliary programs, to that extent the private school child is disadvantaged by having only a small portion of the program available. If we were discussing a free lunch program, in which both state and federal government made contributions, the problem would be clearer. It would be as if the state planned a balanced diet from all resources, decided to use the federal funds to purchase milk and the state funds to purchase meat, and then excluded the private school children from the portion of the program delivering meat.

Alternatively, it would be as if the state were requiring \$2.00 lunches for all children, and paying for lunches for children in half the district from federal funds and the other half from state funds. The half of the private school children in the state-funded portion of the district would not be served, nor could the district provide \$1.00 lunches from federal funds to all the private school children in the target area.

ASSESSMENT OF NEEDS AND RELATED DECISIONS ABOUT PROGRAM OBJECTIVES

At an early point in the implementation of a Title I program, a district must decide what its program will be. Should it hire teachers, or only aids; should it offer intense diagnostic and prescriptive services, or concentrate on standardized auxiliary services; should it concentrate in language arts or math; offer counseling or incorporate a bilingual component; should it provide a lower level of services to a larger number of students, or concentrate all services on fewer; should it serve all schools in the below average income attendance districts, or only the lowest. There are an infinite number of activities a district could undertake, and the larger the district the greater the variety for which there is a need. Districts have an obligation to assess the needs of all children in the target areas, but this is obviously difficult since the practical definition of the target area depends to a degree on the precise approach the district decides to take. After the initial year, of course, things are easier, in that a District Advisory Committee (DAC)

composed of representatives drawn from each public school Site Advisory Committee (SAC) must advise on the plans, making it unlikely that there would occur any substantial redefinition of target areas. SAC members on the DAC are reluctant to approve proposals which would eliminate the sites they represent.

It is even more difficult for the district to perform a needs assessment of the non-public students, since these students are discovered to be eligible only after the public school sites are defined, and the public school Title I staff does not normally have regular discussion with private school teachers and parents to discover what general needs should be met. In general, public schools take the lead in defining the needs programs will meet, and quite naturally, they tend in their choices to emphasize areas in which they perceive their own students to be deficient. But student deficiency is to some extent a product of curriculum, of where the emphasis in a student's regular academic program rests. In many communities public schools have decided that they are doing well in subjects like math, but should emphasize language arts; but for the private schools, which traditionally emphasize language arts to the detriment of math, the opposite emphasis would be more valuable. In one eastern city, the Title I staff performed a needs assessment of the languages which the program should include in the bilingual component of its Title I program, but failed to note that virtually all Russian-speaking refugee Jews had enrolled in Hebrew Day Schools: Russian bilingualism was not included in the program despite great need for it.

It is not inevitable that the basic needs assessment of the Title I program will fail to fully consider the needs of the private school children; many districts have performed the task admirably. Rather the point is that needs assessment is an area in which the comparability of services delivered to non-public school children can be affected by district choices. The proportion of non-public school children served and the quality of their services are affected. As a further complicating factor, we see the possibility that the needs of the non-public students served are different from those of the public school student served, depending on what the emphasis in their respective schools is. Precisely the same services available to all students might produce an incomparability, depending on whether there were systematic differences in students' needs.

TESTING AND IDENTIFICATION OF NON-PUBLIC SCHOOLSTUDENT ELIGIBLES

Once the program has defined its area of emphasis, it must test students to discover which are eligible to receive Title I services, since the services are to be given only to the neediest students. Districts must choose the neediest students for the program, but the area of need measured and the threshold of need chosen to define eligibility are at the discretion of the district, as is the means of evaluating need. As a practical matter, districts are required to use some form of standardized testing, since those chosen as neediest must be chosen relative to the abilities of the rest of the children in the district. The objective tests may, or may not, use national norms as

referents. The LEA chooses the tests it will administer; in some cases the tests require children to be deficient in verbal skills before they will be given aid in math or any other non-verbal subject area. This approach may work to the disadvantage of the private school students, in that fewer of their number would be chosen. As we shall discuss below, in some districts, the number of private school students eligibles affects the number served and the quality of the services; in other districts there is no relationship.

A more serious problem for non-public school students is whether they will be tested at all. Public schools have little difficulty identifying which of their students live in the target areas. The only complications that appear to arise occur when the system has a program of voluntarily-selected public schools or voluntary transferrals; the randomness with which other-- non-target--schools in the system may be chosen can affect the public school child's chances of being examined. But this problem is not widespread. The public school system usually relies for initial eligibility on the tests regularly given to assess student performance.

Because Title I does not have to administer screening tests to public school students, it does not administer them to non-public school students. But the non-public schools may not employ the same tests as the public schools, or may not regularly employ any group-referenced testing at all. If the non-public school cannot show that the children it suggests as eligible for the program meet the achievement percentile used in the public

system as the threshold for eligibility, the children may not be considered eligible.

The discovery of which children should be tested is a major problem for the LEA, and can greatly affect the opportunity of the private school children to participate. Public school systems identify the children which reside within their attendance areas by waiting to see who registers for school. Some sampling and other projective techniques are used in their planning, but the lists of students actually eligible come from their own registry. (The only other lists we have found in use in the course of this survey have been department of social services lists of federally dependent children.) So the public school lists are quite selective, and do not include children in private schools, children not attending school, and children in other state and private institutions. The LEA's must go to the non-public school authorities to obtain lists of children who may reside in the target areas, along with the children's addresses, and in some cases their reading or math achievement levels.

Even the most highly organized private school systems do not collect the names and addresses of attending students in their central offices. In most cases, the LEA must contact each private school principal to obtain the names of students living in the target areas, and this requires the LEA to supply the principal with maps or address lists of targeted streets. For the majority of communities, neither the LEA nor the state office of education possess lists of the private schools in the commun-

ity, so that the LEA must take some effort to acquire that information.

Under the approach followed in most systems, the total amount of services the LEA will devote to students in the private sector is a function of the number of eligibles discovered in that sector. The procedures the LEA adopts to survey the non-public school population are therefore of great importance. An under-census of private school eligibles cannot be discovered by examination of the statistics an LEA submits describing the degree of non-public school student participation.

The threshold at which the LEA decides to consider a student qualifying for Title I services can affect the size of the non-public school population actually served (i.e., the number of participants) and the quality of the services delivered. Non-public schools in target areas have reputations for being academically more serious institutions, and the children in these schools are reputed to have better learned their basic academic skills. In several studies (Hancock, Morton) inner-city private schools were shown to develop their students' abilities to a point closer to median for their grade level than public schools serving similar populations. In general this means that the problems of the children in the non-public schools are not as severe as those of many children in the public schools. Morton finds the difference directly related to school practices.

*Of course, when LEA's candidly report "they don't know" the number of such eligibles, their "statistics" reveal they are not meeting non-public school needs.

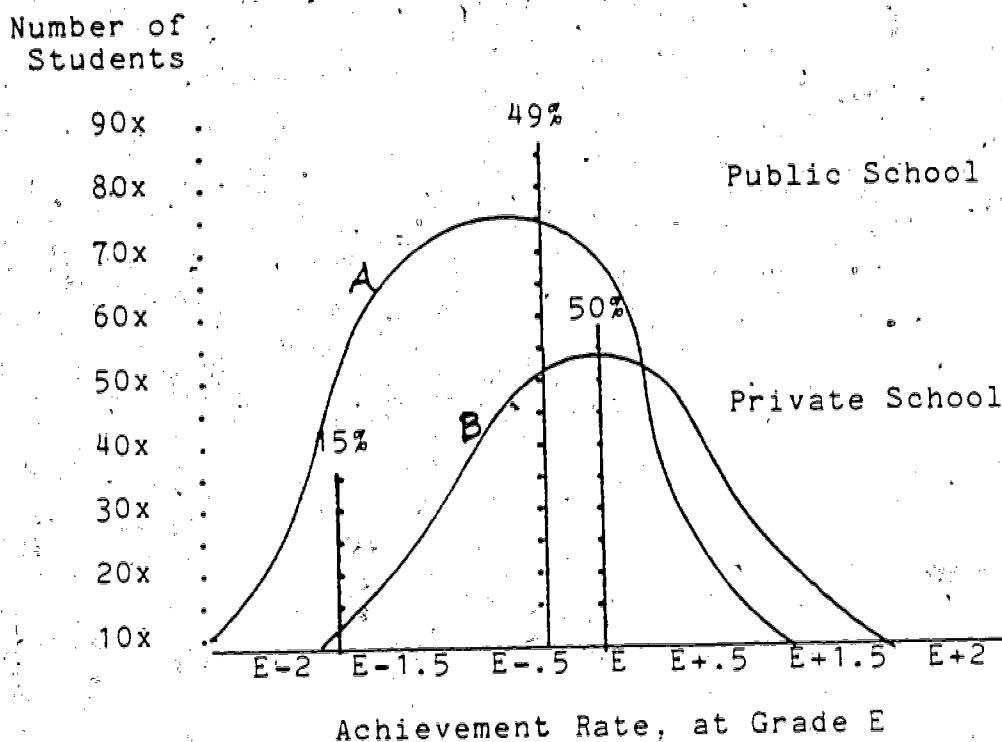
Morton, Hancock, and Greeley each show self-selection does not reduce any substantial differences in academic potential between the two sectors. The point at which the threshold is set (e.g., the numbers of years a fifth grade student is below median achievement for fifth graders in reading, or the percentile ranking of a student in the fifth grade in reading) will determine whether an approximately proportionate number of non-public school children are involved in the program. If a district decides that the cut-off point will be the 40th percentile in reading or math, and that it will serve as many below that cut-off point as possible, starting with the neediest first, it is likely that the LEA will serve as many Title I students as it would if the threshold for eligibility were 20th percentile. But the students included as participants would differ between the two cases. A substantially larger percentage of non-public school children would be eligible, and a larger number of public schools would have eligible students.

Figure A describes the relationship in greater detail. Let us assume that the distribution of achievement levels in both public and private systems is normal, and therefore follows a bell-shaped curve when we chart it. Consider curve A to represent the distribution of below median achievement rates for children in the public schools. Curve B represents distribution for non-public school children. The curve for the non-public school children is positioned a few degrees closer to median. Let line X represent a restrictive threshold at the 15th percentile, and let line Y represent a generous threshold at the 49th

percentile. Line X concentrates the eligible list in such a way that only a small proportion of non-public school children (otherwise eligible by virtue of residing within the target area) are eligible, whereas line Y cuts the population in such a way that virtually identical percentages of public and non-public school children residing in the target area are eligible by virtue of their academic achievement.

EFFECT OF ALTERNATIVE ACHIEVEMENT THRESHOLDS ON THE PROPORTION OF NON-PUBLIC SCHOOL CHILDREN ELIGIBLE FOR TITLE I

Figure A



We cannot argue that the non-public school children are being disadvantaged by the more restrictive criteria, since the same criteria is being applied to both public and non-public school children. The non-public school children would be treated

in a way most similar to the treatment of the children in public schools a few steps above those with the lowest achievement rates in the public system. Adopting a more restrictive threshold is, in most systems, a means of concentrating funds into fewer schools. The more generous threshold concentrates funds in a larger number of schools. In either case the same total number of students will actually be served. Observe that it is possible to vary the proportion of non-public school students served in most Title I programs without changing the total number of students served, and without establishing any unfair biases against the non-public school students.

IDENTIFICATION OF PARTICIPATING PUBLIC SCHOOLS

The choice of the more restrictive eligibility requirement affects more than simply the private school students; in most systems the choice determines which public schools will have Title I services delivered at their site. The determinations which greatly affect the participation of non-public school students appear to be most often made primarily to direct the flow of Title I resources within the public system, and with little anticipation of the private school student consequences. In a nutshell, non-public school students' fortunes within Title I are most often affected by public schools seeking to protect or extend their own Title I interests. This become clearer when we review how public schools are selected to be sites for Title I services.

The LEA defines a target area by selecting some indices of lower-income condition (such as eligibility for free lunch program), and discovering the school district-wide average for that indices. Every public school with an average above the district wide average -- i.e., every school with a higher percentage of "lower income" students -- becomes a target school. Next the LEA must choose the academic need criteria by which it will select an eligible child. Median rates of achievement will vary from school to school, so that the more restrictive the criteria, the greater the proportion of eligibles that will be concentrated in schools with the lowest median achievement rates.

Even the decision about what will be used as the initial indices hinges on the political (distributive) effects of the indices. New York City has rejected criteria based solely on census tract data because it limited the target area to schools in three of the five boroughs. (The data was also flawed in that it dated rapidly.) It has since tried a list of other formula involving AFDC and free lunch data. The district has attempted to find data readily available and therefore administratively easy to use, that does not produce obvious maldistribution of target area designation and, at least grossly balances the resources so that politically important portions of the city are not totally excluded.*

* New York is a special case, because it is a city composed of five counties. Kings, Queens, Bronx, Manhattan and Richmond. When OE first distributed ESAP money, it mistakenly sent checks to each of the five boroughs because the money was to

Districts may allocate Title I resources to their public schools in any of the following patterns. They may estimate the amount of funds they have available for each eligible: hence they will take the total number of eligible students (students meeting both residency and academic need criteria) and divide it into the total amount of money available for on-site school programs. (This is equal to the total allocation to the district, minus money reserved for administrative costs, and funds allocated to centralized or other special types of programs. Such subtractions from the total grant can be substantial, amounting to almost half of all Title I funds in some districts. We will discuss the impact of this on non-public school children below.) Depending on the threshold selected, that is, depending on the number of eligibles discovered, the amount of money available per eligible pupil may or may not be sufficient to supply each student with adequate services. If the amount is too low, then a further selection of students must take place.

Consider the following example: A school district is allocated \$3 million for its Title I program, and it discovers a total population living within its economically

to be allocated to county levels. Richmond (Staten Island) is smaller than the rest, and has a lower percent of impoverished areas. By its association with the other counties in New York City, under certain target area criteria, it would be totally excluded from Title I support. Other counties in the New York area, with much greater wealth but not associated with the city, would meanwhile be supported.

defined target area of 30,000 children. It adopts as a threshold the rule that children must be reading at the equivalent of 2 years or more below grade level at the 6th grade, and finds that about 15,000 target area children meet this criteria. Thus the district has \$200 to spend on every eligible child. However, the district has adopted the following rules: it will adequately meet the needs of each child it will enroll in the program, and it will serve the children with the greatest problems first, unless there are other programs which will support their children's needs (such as public health, NIMH, Bilingual Title VII; or other similar funds). Hence, the district cannot know until it has identified the children it will serve the precise amount of funds it must allocate to each child on average, since it might be forced to spend thousands of dollars on an individual child. Let us assume that the district has roughly calculated that it must spend an average of \$600 per child in order to deliver adequate services. The district can serve only one-third, or 5,000, of all eligible children.

Our hypothetical district could allocate services to each school in its target area equal in value to \$200 for every eligible child in the school and let the Title I staff at the school decide which of the eligibles at the school should be served. In this way, the neediest children at every school in the target area would be served and the number served in each

school would be roughly proportionate to the number eligible. Some variations in proportion would occur because some schools would find they had "expensive" students and could not therefore serve as many. Other schools place upper limits on the quantity of services they will administer to a single student, on the theory that the greater the quantity of services delivered, the less efficient will be the student's absorption. The approach of allocating resources to schools on the basis of number of eligibles has the advantage of spreading services to all schools, but the potential disadvantage of serving children from some schools whose academic problems are much less severe than those in others who are not being served.

Other systems rank all schools according to economic impactation, and then serve all academic eligibles at each school until its funds run out. But in this approach, the systems ignore the potentially severe problems of children who are eligible to receive services, but are attending schools too far down the list of impacted schools. (Recall, furthermore, that the criteria for economic impactation often biases the rankings against certain groups who refuse to participate in government programs.)

Still another variation is found in one large system which counts as eligibles all children enrolled in the target area school, irrespective of their achievement characteristics, and then calculates the cost of a Title I "unit" com-

posed of a teacher-specialist, an aid and a part-time clerk. The numbers of units available given the Title I elementary and high-school services budget are then calculated, and units distributed to each school on the target list, roughly in proportion to the numbers of students enrolled in each school and (for the private schools) living within the target areas. The system gives extra units to schools serving the most economically impacted areas. The major difference in this case is that the funds are not distributed in proportion to the number of children eligible, but rather simply equally, in absolute numbers (since every target area school gets at least one unit) with some attempt to make the distribution proportionate to the numbers in attendance at each site. Hence the chances of a child participating would vary from site to site in accordance with the size of the schools.

When allocations are made on the basis of the number eligible at each site, variations can still occur due to other policies of the system. The system may decide to focus all funds on the first, second and third grade children, and so allocate to each school an amount sufficient for the eligibles at those grade levels. The system may distribute an amount equal to what would be needed by each student participating, or it may distribute an amount based on the total eligibles in the school at all grade levels, and expect the school to concentrate on the primary grades.

Finally, it appears to be the practice in many districts that allocations are made to each school on the basis

of the special programs the school proposes to support, so that the allocation is not by formula, but by discretionary decision of the policymakers, both administrative and PAC. In this case, the funds are still given to the neediest children in each school, although the level of concentration of services may differ dramatically from school to school.

The arrangement for identifying the public school site is important to the non-public school child because, in many districts, non-public school children are only considered eligible if they live within the attendance districts of public schools participating in the Title I program -- that is public schools which are themselves sites for Title I services. In some cases, the non-public school children are not counted as eligible unless they fall within the grade level served at the public schools. This practice substantially lowers the total amount of services available to the non-public school child. So the degree to which services are concentrated affects non-public school student participation rates. The fewer the public school sites, the fewer the opportunities for non-public school students to be eligible. Furthermore, LEA's commonly apply the same concentration criteria to the non-public school site that they apply to the public school site, even though the circumstances are different at the non-public school site. The LEA may, for example, require that the non-public school have 90 eligible children before 30 can be served. But a portion of the nonpublic

school children who might test as eligible at a site are not included in the accounting because they will reside in public school district which are not sites for the program.. The total amount of funds available to the non-public school students at a specific site is thus limited, and may mean that the non-public school students will not be offered equivalent services.

ALLOCATIONS OF SERVICES TO NON-PUBLIC SCHOOL CHILDREN

A number of different approaches are taken to calculate the total proportion of title I funds which should go to serve the needs of non-public school students. Three general approaches are taken, and each poses its problems for non-public school student participation. LEAs may apportion services by sector, public and non-public. They may apportion services to public schools, and consider non-public school children enrolled in the public school for purposes of the allocation. They may simply provide services without making any subunit allocations of any form.

In general, we should note that the approach an LEA takes to its non-public school students normally parallels the approach it takes to its own public schools. For example, in New York City, Title I funds are allocated to each of the 32 districts comprising the New York City system on the basis of the number of eligibles each contains, and to the non-public school service section of the Board of Education on the basis of a per capita allotment for each eligible student attending non-public schools. The system's suballocations are strictly by formula, so that the number of eligibles discovered in the non-public sector determines the proportion of total services that sector receives. Non-public school children are eligible in New York if they reside within a target area, and score at the designated percentile on reading achievement tests.

Within each of the 32 public school districts, and within the division of the public school system which provides Title I services to non-public school children, suballocations are made to schools which will serve as Title I sites. Each of the New York districts is permitted to concentrate its services to the degree called for in its own program, so that there is variation in the proportion of eligibles served from district to district and between the public school district and the non-public school student services portion of the public system. Within each sector, the greater the resources distributed to individual children, the fewer the children which can be served and therefore the lower the proportion of eligibles served and the lower the chances of an individual child's participating in Title I services. It is important to note that all these variations in opportunity to participate and comparability of services received are appropriate, insofar as they are the result of decisions to concentrate services within the sector. The variations in opportunity and quality would be inappropriate if they proceeded from some maldistribution of resources from the central office.

In the New York example, a maldistribution could occur if the count of non-public school student eligibles were too low. All eligibles within the public schools are being counted; similarly all non-public school eligibles should be counted. Each additional non-public school eligible adds one more "per student" allotment to the pool of services available to the non-public school students.

New York discovers the number eligible by a survey sent to all non-public schools in the city, in which it asks each school to list the children attending it who fall below the achievement levels stipulated for eligibility and who reside in the target area. The New York non-public school Title I services have developed sufficient rapport with the private school administrators that most respond, so that the list of eligibles is reasonably complete. But the thoroughness and accuracy of the list is important.

Many districts employ a variation of this approach, in which system officials simply estimate the number of children in the non-public schools who are eligible according to residence, or according to both residence and academic criteria, and a division of the Title I resources is made between public and non-public school students on that basis. The estimate stands in lieu of an actual census.

(In all districts reviewed but one, when the systems shifted from estimates to actual tallies, the proportion of funds allocated to the non-public school sector increased.)

Still other variations are employed. In most of the state of California, the children who live within the attendance districts of public school Title I sites, who attend non-public schools and are registered in grades served by the public schools, and who fall below the achievement threshold so that they are eligible on

academic criteria, are counted (by a survey of the non-public schools) and an amount of funds equal to the proportion of all Title I students who are non-public school students is allocated for services to students in the non-public school sector. The allocation base differs from New York's in that only those children in the attendance districts of the site schools are deemed eligible, and not all those living within the target districts, and only those in the grade levels served by the Title I program, and not all those meeting the academic and residential criteria are counted. The California approach can cause serious problems in the comparability of resources which can be delivered to the non-public school children.

In several instances we found that children in private schools who were eligible for Title I services on all criteria were provided with only a small fraction of the services and resources given to the Title I children enrolled in the public schools. The district administrators expressed a wish to provide more services, but felt under their guidelines they could not. Most participants in the Title I program, in both sectors, recognized the inequality, but did not appear to understand that there was any issue. The inequality was due to a formula they were required to follow*

Other districts have made subdistrict allocations to their Title I sections dealing with non-public school

*For a more detailed discussion of this problem, see p. below.

children, and based those allocations on some calculation of the proportion of low income children attending the private schools. In one western city, all children in families receiving AFDC payments and attending private schools were tallied by a survey of private schools, and the non-public school children allocated a percentage of total Title I services equal to the percentage AFDC children enrolled in them at the time of the survey. Only one survey was taken, in 1971, at which time 4% of the AFDC children were in private schools responding to the survey. There are of course many reasons why children enrolled in private schools might not be receiving AFDC payments, even though qualifying, so that the percent is not likely to be even a fair estimate of the low-income character of the private sector students. But the approach ties the non-public school child's chances to participate to poverty criteria that is not applied to the public sector, and appears inappropriate to the purposes of Title I. Approximately 25% of the children in this city attend non-public schools, and 15%-20% would be a reasonable estimate of the proportion of children eligible for Title I who are attending the private schools here.

The second common approach is to establish the public schools which will be sites for the Title I program, and then complete a census of all private schools in which each private school child is identified with the

public school attendance district within which he resides. The eligible private school children (by both residence in the target area and academic need) are then added to the public school's register for Title I purposes, and the public schools which will be used as sites are designated. The system serves as many public school sites, ranked by low-income importation, as it has resources, given the need for some degree of concentration at each site. Only those children attending public schools which will be sites are themselves permitted to be participants; and each participant "earns" a given number of dollars worth of resources for his non-public school site. There must be enough students designated as participants at each non-public school site before an allocation of services will be made to the children at that site. If that condition is reached, a Title I teacher is assigned to a public school near the non-public school site, to serve the needs of the children located at the non-public school. If that condition is not reached, the "credits" earned by the non-public school children are assigned to the neighboring public school and become resources to use on its Title I eligible students.

An important difference between these two approaches is that, in the first case in which a total allocation is made to the non-public school student services sector of the public system, the pot of services is relatively fixed, and services must be concentrated among the private schools. The total pot has been determined by estimate, or by a past

year's survey, and will not change with the addition of newly-discovered eligible students. Therefore, once the pot is established, the addition of a new non-public school site will dilute services for the remaining sites. Title I creates the condition for competition among the non-public schools looking out for the welfare of their students. Some pressure to compete is mitigated when the pot is not absolutely fixed, but depends upon a survey, for then there is an incentive among the private schools to find as many eligible private school students as possible, and to insist that the Title I staff's priorities in allocating resources to students' needs satisfies the students in the broadest range of schools so as to encourage each of the schools to perform the paperwork necessary to submit the eligibles lists to the Title I staff. In this case, the benefit of all depends directly on the willingness of all to submit the names, and some of those submitting names are likely to find that their children, though eligible, will not receive services. Hence, the same competition exists among the private schools in the later case as in the former, except that the mutual benefit of the schools is a factor in the latter case encouraging them to recommend programs that serve the widest number, under most circumstances.

In the case in which the allocation of resources is actually made to a neighboring public school, and the

services delivered to the private school student (in principle what follows will hold true whether the services are delivered on the private school site, or off site), a competition is established between the public and private schools at the local level over the resources. The public principal, ironically the most interested party, is moderator of the competition. The principal has within his or her power the ability and requirement to make a number of decisions affecting which students will be selected from those eligible at the school site to participate, and affecting the quality of participation. The teachers sent to the non-public school students are assigned at the direction of the public school administrator, and it is quite possible that the administrators would consistently assign the teachers with the greatest difficulties or the least experience and competence to the non-public school site. Similarly, if the administrator finds it impossible to include the non-public school children in the Title I program for whatever reason, then the resources of that portion of the program accrue to his school, the public school, and not to other non-public school students.

When the total pot of services to be delivered to the non-public school students is not fixed as a percentage of the public school allocation, but is the product of some formula involving the number of eligible students in the public schools, a competition is set up between

the public and private sectors over the use of Title I resources to benefit their respective students. The private schools are forced to act as ombudsmen to protect the interests of their students, since the public system has some interest in "not discovering" the eligible students in the private sector. The more efficient an administrator is in uncovering all eligible private school students, the less resources are left to divide among the public school sites. The discovery of eligible students is entirely the responsibility of the public schools, and it is the public schools which must inform the private school administrators of the program, survey the private school population, and evaluate test results for academic qualification for the program.

In a third common approach, found frequently in smaller districts, no suballocations are made nor is there any school by school accounting of resources, nor in some extreme cases, any meaningful accounting of resources expended on each pupil. Children are identified as eligible for Title I on the basis of their residing the low income area and achieving at a low level. The achievement threshold is set low enough so that all eligible children will receive services. Low cost services (like aids) are provided on site, managed by central administrators, and supplemented by the heart of the program, itinerant specialists. Each child is given all the services diagnosticians request, and no distinction is made between children in public or private schools,

nor is any per pupil accounting of services consumed made. The equality of opportunity afforded non-public school pupils under the approach, and the comparability of the resources they receive cannot be checked by budgetary quantitative analysis, but can only be reviewed by appraisal of procedures and plans in conjunction with some supportive information on resource allocations.

There is an irony here, for children are treated most comparably when the amount of resources available to meet their needs does not vary by virtue of their being in public or private schools. The districts closest to this ideal do not allocate services to the sites at which they will be delivered by any fixed formula -- they could not and remain responsive to the great differences in individual needs they might find -- and tend not to even account the amounts delivered on a site-by-site basis. The accounting by site is not useful to their planning or other program needs, and invites comparisons and political movements in the district to equalize "maldistributions" among the sites which would make impossible their approach. But unless we obtain the per pupil allocations of services for each sector, public or private, we have little to base an evaluation of comparability on. The "most comparable" approach we have found to the distribution of Title I services takes a form in which it is extremely difficult to show that comparability is being met.

On the other hand, the approach easiest for evaluation, in which separate total allocations of funds and services are made for public and private sector students based upon the number of eligibles in the respective sector, ties the likelihood and quality of the services a student participation receives to his or her attendance at a public or private school.

PLANNING FOR SPECIFIC PROGRAM OF SERVICE DELIVERY

However matters are arranged, once Title I eligible students are identified, and the general amounts of resources and types of resources that will be available known, the Title I administrator must plan what will be offered at each school. In all cases in which the program is well-executed, the Title I administrator must consult with the site principal, and plan a program to be followed at that site. This planning involves first an identification of the needs of the children who are Title I eligible, and then some decision about which of the many kinds of needs that will be found should be served. Children could be deficient in math, reading ability, motor coordination and have damaging emotional problems. They might be deficient in their experiences of the cultural, social and economic complexity of their community. Decisions must be made about which of these needs can be served. These decisions take place at several levels. The very first level is system wide, and is made at the time the initial LEA Title I program

designed;* then similar decisions are made at each level of fund allocation. If funds are divided between public and non-public school students, then decisions about what should be done are made by the Title I staff providing services to each type of student. In New York, where the non-public school student services are separately accounted, the Title I administrator consults a non-public school sector advisory board about the services which should be offered to the non-public school students. (New York's non-public school student Title I program differs from the program offered to the public school students in that it includes a guidance component not chosen in the public school sector.) Districts follow many different policies in determining the levels to which they will allocate Title I funds; the most comprehensive listing would include public/non-public sectors; subdistricts within the public system; major divisions within the public school organization (pre-school, Kindergarten, elementary, intermediate and secondary, special schools); specific school sites. Decisions similar to those made at the sector level can be made at every point down the line at which a specific allocation of resources has been made. To allocate resources by a formula to a sector, subdistrict, functional division or a site means to give that level the power and obligation to make some decisions about how those resources will be

*Discussed above, p

used. In such a case the program adopted at one site will almost certainly be different from those at John Muir.

Comparability requires that the program adopted at each site be different (and this imposes the need on centralized programs that they contain in their plans alternatives and contingencies and that they be very flexible in their execution) because the needs of students normally will vary considerably from site to site. It is likely, for example, that a Title I site serving Hong Kong Chinese children will have needs different from one serving poor Appalachian migrants to the northern cities, or others serving Haitian (French-speaking) blacks. The state of California, in fact, requires that a separate proposal be forwarded from each site, with plans for what will be done there.

Non-public schools are affected in three ways. First the principal and eventually the teaching staff at the non-public school must be involved in the planning of the Title I program. The same involvement is necessary at the public school, as well, but the public school system pays its teachers and principals for the time they give to the Title I program; it does not pay the private school staff, and the Title I program thus requires the private schools to contribute services to the federal program.

* Similarly public school systems frequently contribute regular staff time to the federal Title I program, although in some systems the program is charged a pro-rata share. Not to pay similar expenses to the non-public school produces another type of incomparability.

The degree of contribution required can vary from district to district, depending on local practice, but in those places in which plans are made without consulting the private school administrator or staff, the private school children are disadvantaged in comparison to the public school children, and in view of the steps the program must take in order to benefit the students. Not only will the program of therapy vary according to the (so-to-speak) native needs of the students, but it will necessarily vary according to the program of education being followed in the student's regular classroom. Title I is supplemental to regular instruction; thus it must be cognizant of the timing of the introduction of materials in the regular classroom instruction. Some coordination must take place at the site planning stage; other must occur through frequent consultation between the Title I and regular classroom teacher during the term of instruction.

So close is the connection of Title I instruction to the regular classroom instruction that many districts have developed an inservice training component of their Title I program for the regular classroom teachers so that those teachers know what to expect of the Title I staff, what resources the staff offers the students, and how the services will be given, and what advice the staff will need from them.

Non-public school teachers and staff must be involved at every stage of consultation and training that

the Title I program feels it is important to involve public school staff in; and yet this involvement affects the non-public school staff differently for their services must be contributed either by themselves or by their schools. But if they are not involved, the quality of the program their students receive will suffer, perhaps disastrously. For example, one Title I teacher in a Western city adopted a "look-see" method of instruction in remedial reading, while the regular classroom teacher was following a method based on phonics. The two methods follow virtually contrary rules, and the net effect of the Title I "support" was to undermine the regular classroom instruction.

Non-public schools may be left out of the planning phases of the Title I program for a number of reasons, and the most common appears to be poor planning by the Title I staff, and the weak communication channels between public and private schools, combined with the relatively tight deadlines imposed by the funding cycle on the Title I program. Quite frequently, important planning is done during the summer months when private school staffs have scattered. And often planning and consultation must be done during hours set aside for the purpose in the public school, but which in the private schools are given to other duties.

Perhaps the least difficult planning, but often the most time consuming, involves the actual scheduling of Title I services. Title I children are drawn from the

regular classroom (if the LEA is using a pull-out programs) in any number from singly to groups of five to fifteen. All children may be drawn from the same classroom or grade level, or they may be drawn from any number of classrooms depending upon their ability grouping. In no case should the child be taken from the classroom at a time in which his or her regularly scheduled instruction would be a basic subject, especially not the basic subject in which he or she is being aided. Title I is not to substitute for regular instruction, but to supplement it. Furthermore, the Title I program should be run as much as possible during the early school hours, when the children are fresh, and the children should not be drawn out of any one class regularly, so that the student misses a whole subject of instruction. The last problem is complicated by the fact that schools normally schedule their more difficult, and important subjects in the morning hours when the children are fresh. Either the Title I teacher or the principal must so schedule the regular instruction periods and the Title I periods that the burden of missed course sessions is shared by all non-reading and math subjects. In a religious school, it might mean that Title I classes would replace some portion of religious instruction, although that result may be avoided by sufficient planning.

The Title I administrator and teacher will also consult with the school principal in both sectors in

identifying the children most in need of remedial services in any school in which only a portion of eligibles can be served.

Some LEAs have refused to deliver Title I services to non-public school children on days on which the public schools observe a holiday. And of course they cannot provide the services on days on which the non-public schools have declared a holiday, though the public schools be in session. Presumably the LEA has an obligation to provide an equivalent number of days of instruction to children in either sector, and must accommodate itself to the times at which the children are available. The program is to serve children's needs, and may not deny this service simply for administrative inconvenience.

It is relatively simple to discover whether the LEA is accommodating its routines to the school calendar followed by the non-public school children, but the matter cannot be settled by examining the number of days of instruction credited to the Title I teacher serving the non-public school children on simple audits of activities, since the teachers will work the days on which there are no children in school "in preparation." There will be therefore no difference in total amounts expended per child between the public and non-public sectors, since the money was spent even if the service did not reach the child. The expenditure could be equal, but the services received vastly differ. For example, in one Easter LEA, accounts showed perfectly equal per pupil expenditures for Title I in the two sectors, but then we found that the non-public school Title I program ran for only half the school year.

SELECTION OF TITLE I TEACHERS

Occasionally, Title I teachers serving non-public school students are selected on a different basis from those serving public school students, and the differences can affect program quality. Only some of these differences introduce problems of any substantial consequence for comparability, although some other issues -- such as the impact of the program on the non-public school -- are involved.

Some LEA's hire only temporary teachers to staff the non-public school positions, but give permanent appointments to teachers serving public school students differently. They reasoned that they would be prohibited by law from staffing the non-public portion of their program if for some reason federal funds were to end, but that they could legally fund Title I teachers in the public schools themselves, and so could permit that portion of the program to go on the tenure line. This latter interpretation is politically convenient for Title I -- at least the reasoning that public school Title I teachers could be given regular, tenurable positions in the system -- since the unions which so strongly supported Title I expected the program to produce secure jobs, and jobs subject to all the benefits the unions had already won for regularly appointed teachers.

But other systems, principally smaller ones, took the position that all funding was dependent on federal grants and

and could end at any time and that the system could not therefore afford to make any tenurable appointments. In these systems all teachers are on part-time appointments, or the LEA runs its program without regular teachers at all, but solely with aids and some central resource supervisors. This means, therefore, that in some systems the non-public school children are given teachers on temporary appointment, just as the teachers are who serve the public school children. In other systems the teacher of the non-public school students is a part-time teacher, or on temporary appointment, whereas the teachers in the public school student portion of the program are on tenure lines.

But it is difficult to predict in the abstract whether the difference will introduce a bias in the quality of the programs given to students in either of the two sectors. If, for example, the non-public school sector of the Title I program has relative autonomy in the use of its budget, as in New York, then the requirement that the sector hire only teachers on temporary appointment means that the average cost of a teacher for the sector would be much lower than for the public school sector, and that it could hire relatively more teachers with its allocation. The factor alone can make a very great difference in the quantity of services available to the non-public school children. New York City's non-public school student services sector for example, hired

over 700 part-time and temporary teachers to serve the non-public school students, many of which were retired former teachers with good experience and records. A year later, with a larger budget but required to employ tenured teachers bumped from their regular staff positions by the budget cuts, the sector could employ fewer than 300 teachers. Non-public school administrators report, however, that even though the quality of the staff in the non-public services sector of the New York City Title I program had been reputed to be the best in the system, the quality improved noticeably after the tenured teachers took their places.

In some other systems, the teachers who are to serve the non-public school children are selected by each public school principal from a pool of teachers assigned to serve the public and non-public school students at their respective sites. The public school principal, in other words, has primary administrative responsibility for the public and non-public school student Title I teachers. Nothing prevents the principal from selecting the most troublesome teacher or the poorest teacher to serve the needs of the non-public school children at their sight. Such actions are difficult to discover, and we are forced only to be wary for signs.

Some districts equalize the cost of a teacher to a program, but keep the Title I budget disaggregated to the school site, or the non-public school sector. When this occurs, the private school students are deprived of the compensation in terms of the increase in numbers of

teachers they would have obtained from being given only low-cost teachers.

In other ways, the use of temporary teachers has hurt the private school program. Private school students have been particularly disadvantaged by the practice because in a substantial number of those sites which were required to cut back their teaching staff, the systems fired all the temporaries in the non-public school Title I program and placed in their stead tenured teachers often not certified in the specialty required by the Title I program. For example, in one large eastern city high school English teachers were reassigned as lower-elementary reading specialists, in the private school sites and teachers previously serving those positions and specially trained for them were fired. The system administrator explained that a high school English teacher previously assigned to inner city schools in fact taught basic remedial reading.

In addition to assigning many inappropriate teachers to the non-public school students, the sudden change of the entire non-public school staff disrupted relationships between the private school administrators who had to advise the Title I staff and the staff. In the course of the years in which the Title I staff had been in place in the non-public schools, many problems had been worked through which now--all at once--occurred again.

The selection of teachers touches an issue beyond comparability. (One of the most difficult problems for public schools in the program is the requirement that it accept as an instructor of children in the private school charge a teacher who has been selected, hired and is supervised by the public school system. Note that we speak of "accept" here, because as a practical matter, the private school can refuse to cooperate with Title I and withdraw its children from the program. In a few instances, private schools have withdrawn from the program. But in general, the problems with the public school teacher on site have not been found to be as difficult as they might appear. What problems exist principally affect two areas--religious orthodoxy, and staff satisfaction. Religiously oriented private schools have had to accept teachers whose religious beliefs and practices differ from those taught at the school. Since most such beliefs do not enter into the instruction given within Title I, most private schools enrolling Title I eligible children have been able to accept the public school teachers. The only significant exception appears to involve certain fundamentalist schools, such as some run by Seventh Day Adventists and Baptists, in which central assumptions of the scientific approach (commonly adopted in the public school) conflict with those churches' understanding of the Deity. The schools run by fundamentalist churches typically do not participate in Title I programs. As a rule of thumb, if the private school believes it cannot use the same textbooks as the public schools, it cannot accept Title I.

To the extent that LEAs do not make provisions to serve the children eligible for Title I but attending private schools which refuse to "participate," they are failing to treat the children comparably. The eligibility of the child is not contingent upon the interest of the non-public school. However, in the absence of private school cooperation, there are great practical problems to running an effective program.

The private school staff may sometimes come to resent the great difference in benefits the on-site Title I teacher receives for what often appears to be an easier job. A typical salary for a Title I teacher is \$14,000 to 18,000 (up to \$23,000, with fringe benefits equalling between one-third and one-half of salary (9 months salary). Typical salaries in inner city private schools for lay teachers range from \$4000 to \$8000. The Title I teachers teaches one subject to a small portion of the class that the private school teacher has for all subjects. Typically the Title I teacher will serve from 35 to 45 children a day, usually in five classes of 7-9 children each, and the teacher is assisted by an aid which permits sessions in which the teacher is one on one with the student. The regular classroom teacher typically serves classes of 27 to 45 pupils without an aid. Furthermore, the Title I teacher is supplied with all materials, books, technical aids and equipment needed, whereas the regular classroom teacher must do with used books and a small supply budget. The Title I teacher typically begins

class day at least one hour after the beginning of the school day, and ends at least one hour before the end of the day. In sum, the Title I teacher has 15% to 20% of the students, for two-thirds the working day of the regular teacher, and receives two to four times the pay. The differences can cause some dissatisfaction among the private school staff (although in fact real instances of the Title I teacher being responsible for such problems appear rare.)

The Title I teacher is subject to the dress codes and behavior codes of the public school system, and can therefore cause the private school some concern, since the private school administrator cannot directly order the Title I teacher to follow the private school standards. But a certain amount of self-selection takes place among the Title I staff--less in time of layoffs and forced assignment to private schools--which minimize any potential problems. The selection of private schools by Title I staff parallels the selection of private schools by the public school staff. The same reasons appear operative in both cases.

MANAGEMENT OF TITLE I TEACHERS AND AIDS

Some LEA official, (in some systems the building principal, in others supervisors on the central Title I staff) must supervise the Title I teacher and aid, certifying that they performed the work they contracted to do, that they appeared at the school on time, presented a good example to the children in their appearance and behavior, and carried out their teaching duties with care and skill. But the Title I teacher in the non-public school is usually stationed at a site at which there are no supervisors employed by Title I, or by the public system. In many districts, only persons with a principal's certificate can supervise a certified teacher, and many of the private school principals will not have a principal's certificate so that Title I cannot in cases even request the private school principal to carry out the supervision. If the LEA hold that only Title I staff may supervise Title I teachers and aids, then the public and private systems will be supervised to the same degree; if the LEA holds that the building principal should supervise the Title I teacher, then the private school Title I teacher go unsupervised for all practical purposes, for there is no line of authority linking the private school principal and the public Title I employee. To remedy this the LEA have appointed special supervisors of the Title I teachers at the private school sites, or have consulted with the private school principal. In some cases, however, the public system has provided no management and supervision of Title I staff placed in the private

school, and in this fails to carry out its responsibility to insure that the children are receiving the full services they need.

PROGRAM EVALUATION

Evaluations of the Title I program are expected to be performed on a regular basis. Title I carries no requirements that the non-public school student participation in the program be reviewed separately, or reviewed at all. Similarly, few states are prepared to insure that all non-public school children have a comparable chance to be designated eligibles, or to be served, nor can any ascertain that the quality of services delivered is comparable. The office of education has virtually no information on the matter.

10. PARENT ADVISORY COMMITTEES AND DISTRICT ADVISORY COMMITTEES

The importance of advisory committees varies from district to district, depending on local district internal school politics. In some districts all decisions affecting program directions or resource allocations are authoritatively made by the Parents Advisory Committee or District Advisory Committee. In others, the committees are truly advisory. They may be consulted often or infrequently by the Title I Administrators. In some districts, advisory committees have not been formed, or if formed rarely meet; or if hold meetings, rarely are attended by other than school staff. Ease of transportation is a factor affecting advisory committee

importance; in some districts parents of children in the program live hundreds of miles apart, or even on distant islands.

To the extent that the Advisory committee has some ability to direct the flow of Title I resources, and to affect program objectives, the actions of the committee are important to the interests of the non-public school students. Title I does not require a site advisory committee be formed at non-public school sites, presumably because the committee might begin to act as a school board for the private school, against its wishes. The district advisory committee, often the most important one for the determination of the sites which will receive resources, is composed of representatives of site advisory committees. Hence, there will be a strong conservative bias in the decisions of the committee, in so far as self-interest guides the placement of future years services.

Typically, the non-public school students are represented by one or two parents on the district advisory committee, even though the non-public school children comprise as much as 25% of some Title I programs. The non-public school students are structurally deprived of equality in the committee proceedings which produce the determinations of basic Title I program dimensions. Their interests are not represented by parents representing the public school sites.

Despite their disadvantage, however, in some districts the non-public school representatives have done very well at

the Advisory Committee proceedings, defending the interests of their children, allegedly because there is a greater tendency for these parents to appear (perhaps feeling the competitive threat from the public schools).

But the non-public school parents' appearances are often made difficult by the LEAs failure to notify them of meeting times. Some districts make all Title I announcements only through the regular communication channels of the public system. Other districts make all their Title I announcements only at the DAC meetings, so that the attendance of non-public school students' representatives is particularly important. Attendance may often mean the difference between receiving a project and never hearing of it in some districts, where reallocations of resources which must be spent in short periods of time force quick decisions.

D. OTHER ISSUES

When There are No Public Schools. In some remote sections of the country, there are no public schools, although there are private schools. There appears to be no way in which Title I services could be administered to those students. Most of these areas are on Indian lands, and the students served by Bureau of Indian Affairs schools. Bureau schools themselves are considered private schools and are given a lump-sum allotment. Because bureau schools are voluntary institutions, they do not define "attendance areas". Consequently, private school children in their vicinity are not eligible simply because the

the Bureau students are.*

Single School Districts. In other areas where public schools are organized, for one of several reasons the entire school districts may be Title I target areas. How does such a situation affect the non-public school. The approach can create some anomalies. Some rural areas will have a single high school in its district. Such a high school is automatically a target school and its entire attendance area, the entire district, a target area. The district may contain some private schools--even elite academies--drawing children solely from the county; all children in such schools would be eligible.

Segregating Private Schools. In virtually all districts (we have found no exceptions), schools which practice racial segregation are excluded from participating in the Title I program. In this, the LEAs are following directives from the Office of Civil Rights (OCR). All participating schools must sign assurances of non-segregation of facilities. However, the obligation under Title I is between the LEA--the agent of the federal government--and the child, not between the LEA and the non-public school. From the strictest point of view, the characteristics of the non-public school are irrelevant to Title I; the public school system operates the Title I program, not the non-public. But that does not mean that the federal government may support segregated

*These are discussed on chart _____ below.

Title I classes. LEAs are responsible for the segregated or integrated conditions of Title I classes, and when the LEA has evidence that the site at which it would normally deliver services is segregated by policy, then it is obliged to intervene and insure that its Title I classes are integrated. As a practical matter, this may mean that the LEA must make Title I services available to the eligible children attending segregation academies at the public school site.

It may well be in the national interest to attempt to integrate a portion of the experience of children attending segregation academies. It is, of course, unlikely that many parents would enroll their children in Title I from these academies if all Title I classes were integrated, but federal policy should not preclude their opportunity. In all events, the distinction that this is a child-benefit, not a school-aid, program should be kept clear, especially with respect to private schools.

Off-Site Services. In the case of segregation, off-site services are a practical requirement of the program. However, for several reasons off-site services cannot be comparable. Most of the reasons have already been reviewed in the discussion of points above, and need only be summarized here and a few new points added. Off-site services, in which the non-public school child travels to the public school site, cannot effectively be planned or coordinated to fit the child's

to fit the child's regular program of studies, but such planning is extremely important to the successful operation of the Title I program. Generally, off-site services must be delivered after school hours or during the summer months. Such programs have markedly lower rates of attendance where they have been attempted, and several reasons have been given for this: at the high school level, many students must work after school hours, or are members of athletic teams or participate in other extra-mural activities which are generally deemed important to high school study. Children have short attention spans, and tend to tire after a morning of instruction. For this reason, lighter courses are regularly scheduled after midday. The Title I courses would come only at the end of the day, at a time at which--reflected in its own schedule--the public system has decided it is already too late to effectively hold classes. The children cannot be expected to attend as regularly, or to learn as readily. In some LEA, there is a rivalry between public and private school students. In places youth gangs have divided neighborhoods into rival territories along school attendance boundaries. Private school children frequently are identifiable by uniforms and the Title I program on the public school site would require the children to risk harassment.

Furthermore there is some evidence indicating that Title I programs are most comparable when there is a Title I coordinator in the non-public schools, hired by the non-

public sector, watching out for the interests of the private school children. Where such coordinators are absent, non-public school children are least likely to be served. Unless all services in the system were off-site, it is likely that neither the discovery of eligibles, nor selection for participation, nor planning, nor delivery of services, nor the effectiveness of the program would be as adequate for the private school students served off-site as for the public school students served on site. If all services were off-site for all students, then effective and adequate plans would have to be developed, and we could repeat comparability.

The limiting factor would then be cost. The transportation of students is expensive, and could readily amount available for each eligible child, thus requiring much greater concentration. Some systems employing off-site services for the non-public school children have charged both transportation and the costs of keeping the public school open to the allocation of funds available to serve the non-public school children's needs. This would produce an incomparability since transportation in itself meets no academic needs.

Chapter 5

LOCAL AND STATE EDUCATION AGENCY PRACTICES

Given this series of points at which potential problems for the comparable participation of non-public school children could arise, we looked at the practice of school districts to see what problems actually occurred and with what frequency. Our aim was to review current practice and suggest ways in which the law or its regulations should be changed or added to, if change is needed. But the type of careful review of procedures we found necessary is very time-consuming and costly. We therefore obtained a sample of districts, which we studied through site visits and extensive interviews. In a larger sample, we conducted phone interviews to establish the pattern of Title I procedures and practices.

METHODOLOGY

In our analysis of NIE's District Survey I, we found a general pattern of failure to deliver comparable services to a properly proportionate number of children in non-public schools. We have designed a comparative case study approach. To probe deeply into why these patterns were found, we used extensive on-site observations and interviewing of principal actors and informants, and developed a detailed and complete description of the administration of the Title I program within the LEA in a sample of districts.

We emphasized the identification of discretionary policy

decisions defined by the LEA. Our study also shared some of the features of survey research methodology—in our selection of a sample of LEAs containing non-public school children along regional, urban-rural and LEA-size dimensions, and in our asking questions about the same basic set of procedures within the Title I program in every case. Our survey essentially interviewed institutions. We did not seek individual opinions about the program.

In sum, this report is based on 22 site visits to LEAs, supplemented by telephone-interviews with 43 additional districts covering the same points as those covered in the site visits, but in a more condensed interview schedule. In addition, we conducted interviews of 34 state education agencies and three regional areas and the central Title I office of the Bureau of Indian Affairs (BIA).

Sample design. Selection of state and local education agencies for inclusion in this study: We selected 34 states for study, to describe the state procedures for implementing Title I to assure delivery of appropriate services to private school students. We selected the sample of states to ensure examples of those characteristics of the state education agency (SEA) that might have important effects on the way a state implements Title I for private school students. We divided the states (1) into groups by region (following the Office of Education's definition of ten regions in the U.S.); and then (2) into urban and rural, using the NIE definition of

an urban state as one that has more than half its student population residing in urban centers.

We grouped the states into four groups, according to the degree of direction the SEA gave to LEAs in the state on the implementation of the basic Title I program. (We hypothesized that the more active the state was in general in directing the way in which Title I funds would be used, the more active it would be in ensuring that private school students were served according to the provisions of the act.) We used the four-point scale employed by NIE in the study of SEAs: a score of I means low amount of SEA direction; II, uneven direction; III, a change in the history of the SEA's implementation of Title I from a low to a high amount of direction; and IV, a consistently high amount of direction. Finally, we grouped the states into those with a state compensatory education plan of their own and those without. We reasoned that SEAs already running state compensatory education plans would have developed both higher levels of regulative expertise, and more highly refined substantive positions about what could be done in the programs.

Using the characterizations of the state offices made by NIE in its study of state education agencies, we then selected 14 states as a representative sample, according to both region of the country and administrative character of the central state office of education. In each of the 14 states selected for closer analysis, we chose three communities

from a list of 18 potential sites suggested by SEA officials: three sites with large, and three with small, private school populations for each of the three locations (urban, suburban and rural). We requested these nominations from the SEA officials both to take advantage of their knowledge of their own states, and to be able to employ their support in contacting the LEAs. We picked only three sites from each state's list of 18 nominations, to minimize the chances that SEA officials could nominate only "showcase" LEAs. We furthermore did not notify SEA officials which LEAs had been selected, to make more difficult any advance preparation or coordination of answers.

Preliminary questions. We then wrote introductory letters to the 43 school districts chosen, guaranteed them selected anonymity in this report, and requested specific enrollment and budgeting information for both public and non-public school students in the Title I program. At each LEA, we asked for the following information:

1. Whom should we contact in the non-public sector who will know the most about the Title I programs in your district?
2. What are your working program definitions of Title I eligibles and participants for public school student? For private school student?
3. How is the determination of eligibility made? How is the number of participants determined? Do you survey? Do you test?
4. By what criteria do you select sites for the delivery of services (project schools) in the public system? Are services delivered to non-public school children at the non-public school, public school, or other site? By what criteria do you select the non-public school site?

5. How many eligible public and non-public students were there in your district in school years 1975-76 and 1976-77?
6. How many public and non-public pupils participated or actually received Title I services in those school years? Please report the totals separately.
7. By what criteria do you decide degrees of concentration of services? Are public and private school students in the same pool or different pools, for purposes of concentration?
8. What was the total amount of Title I funds given to your district in 1975-76 and 1976-77? What proportion was used exclusively for services for the public schools?
9. What proportion of these funds were used for non-public school pupils in 1975-76, 1976-77?
10. How are funds allocated to the non-public student sector?
11. We must know what kinds of services are delivered, and how they are delivered:
 How many schools are served?
 What kinds of programs are conducted (e.g., reading, bilingual, etc.)?
 Are some services available only to public school students in practice? Which?
 Are some available only to private school students? Which?
 How many teachers and aides serve the public sector?
 How many serve the non-public sector?
12. Are non-public administrators, teachers, and/or parents consulted in the planning, administration, or operation of your Title I programs? At what time in the planning process? What kind of involvement do you believe participation entails?

We then filled out the chart on the following page for each district:

Number of Public and Private School Students Receiving Title I
Services, and Value of Services, and Additional Information
1975-76, 1976-77

This district is

Elementary only _____

Secondary only _____

Unified _____

	1975-76		1976-77	
	Public Schools/Students	Nonpublic Schools/Students	Public Schools/Students	Nonpublic Schools/Students
Total Number of Registered Students				
Total Amount Title I Funds received by District				
Number of eligible public schools				
Number of public schools participating or Non- public schools served				
Number of eligible Students				
Number of Participating students, (duplicated count)				
Number of Participating students, (Unduplicated count)				
Number of Teachers on site (FTE)				
Number of Teacher aids, assigned on site (FTE)				
No. teachers, itinerant or centralized				
No. aid, itinerant, or centralized				
Estimated value (\$) of services delivered				

156

FTE - full time equivalent

KEY IMPLEMENTATION QUESTIONS

Based on preliminary field interviews with SEA officials, we developed a schedule of key "implementation points" where biases in the delivery of services to Title I students could enter the process, or where private schools could appropriate for their own use the Title I funds or services. These questions were assembled into an open-ended questionnaire answered in a telephone interview by LEA superintendents and Title I officers in the 43 selected districts.

We attempted to make the telephone interviews brief, by following a protocol which focused immediately upon the key implementation items. We found, however, that the interview questions themselves needed substantial explanation; that most districts did not have carefully articulated procedures for implementing the program in the private schools. Many districts differed substantially on such basic matters as defining the target areas and identifying eligible non-public students. We developed an open-ended questionnaire which provided a standardized explanation defining the information we requested, and flexible enough to cover most of the situations we encountered in the LEAs.

Our analysis concentrated on the following key points:

1. Economic criteria for selecting the target area.

Is it keyed exclusively to public school data, like public school free-lunch programs or the number of AFDC students concentrated in a public school attendance area?

Or does it include private school students in the initial survey? The economic criteria is related to a geographic area, usually a public school attendance district and occasionally a census tract fitted to the public school attendance maps. Do these geographic boundaries work to the disadvantage (in some arbitrary way) of private school students? The type of economic criteria employed affects the size of the target area, and therefore the concentration of the Title I project.

2. Target schools. Not all students in the target area are eligible for Title I programs; eligibility criteria also include academic need. Schools can be selected as target schools on the basis of economic criteria alone, or on a combination of economic criteria and student achievement criteria (or academic need of a portion of their enrollments). Typically, within the eligible area, all students are tested and a certain threshold of achievement is established as defining eligibility. How are they tested? Do the same test standards apply to private as to public school students? Are the private schools required to furnish their own tests: does the district survey the private schools? Does it have lists of the private schools drawing pupils from the target area?

All schools within the target area may be included in the program, but more typically services are concen-

trated at a few schools selected according to the number or percentage of eligibles they have. Private schools are typically selected on the same basis, i.e., the number of eligibles. The fairness of this approach will vary from system to system, depending upon the relative sizes of the private and public schools. In systems where private schools tend to be small—100 to 200 students—and public schools large, the number of eligibles required for the school to become a site for the delivery of services is often so large that private schools do not receive the services.

3.. Participating student. The stage of selection where participants are identified and given diagnostic tests varies widely among school districts. Where districts used broad criteria for the identification of eligibles, they frequently will use much more stringent criteria to identify participants. Or districts make all eligible students participants. There is no real difference in the number of public school students selected for the Title I program by the two approaches. (The only difference might come from the tendency to concentrate services more highly in the two-step selection process, but in fact it is possible to concentrate the steps in the one-stage identification as well.) But the two-stage approach will make a difference to many private schools. Private school students, generally speaking, have lesser

degrees of educational disability especially in the upper, elementary grades. The lowest-achieving students will be disproportionately public school students. The more stringent the threshold for identification as a participant, the proportionately fewer private school students will be found eligible.

When this factor is combined with the small size of the private schools, a subminimal number of students are found eligible in the private schools, too few to support the services of a Title I teacher. It is particularly difficult to discover this type of bias in the identification process.

4. Concentration of services. Services are concentrated in two ways: (1) districts can establish a minimum amount of funds which must be spent on each Title I eligible student (and a maximum amount); (2) districts can establish a minimum Title I program. Many districts do neither, but simply allocate a specified amount of funds per eligible student, and permit the school to decide how the total budget (the sum of per pupil grants) is to be expended. Some districts make the allocation only to participants. Some districts fund programs of services, and make a certain proportion of that program available to each school.

Non-public schools may be allocated budgets on the same basis as public, or the allocation formula may differ.

Typical of the early years of ESEA was an approach which would give to the private school sector a simple percentage of the total Title I funds, proportionate to the percentage of low-income children informed observers believe were enrolled in the private school participating students. The budgets would be stated in terms of services—i.e., call on central staff time—rather than dollars. The establishment of the budget, the determination of the amount of services to be delivered to private school students once found participating, are obviously crucial stages of the allocation process.

5. Program content. Proper evaluation requires that program content be compared, but the standard cannot be "identical" program content for private and public school students. The programs of the two schools and the abilities and needs of their students are likely to be different. It cannot be simply assumed that the Title I program will fit the program designed by the private school. The fit of the Title I program with the child's regular course of studies must be planned.

One proper criteria would be to see that equivalent needs are met in the public and private schools. (All other steps in the identification of private school eligibles and participants, and the establishment of a budget for the private school Title I program could be

without bias, and yet the program could be totally biased at this stage. Milwaukee, Wisconsin, for example, provided summer nature enrichment courses for private school Title I students, but reading and math instruction during the school year for the public school Title I students.

6. Program planning. The key to establishing that the private school programs are well-planned is to discover who proposed the programs at which stage of the grant application process. Are the private school officials informed of the planning stage of the grant? Are they invited to participate? Do they in fact propose approaches to the Title I program? Are they consulted on a continuing basis about the implementation of the program? Early participation of these private school leaders is necessary if the Title I services delivered to private school leaders is necessary if the Title I services delivered to private school children are to fit their needs as well as the Title I services are designed to fit the needs of public school children.

7. Service delivery and administration. How are the teachers serving the private schools selected? How assigned? Are the teachers assigned to the private schools similar to those assigned to the public schools? Is there a bias in teacher assignments, such as existed in New York in the early years of the Title I program, when only temporary teachers and substitute teachers were assigned

to the private schools because the teacher union would not permit experienced teachers to teach in the private schools?

Are the services received by the private school students, on balance, equivalent to those received by public school students? Do private school students eligible for Title I have the same opportunity to participate in the program that they would have had if they had been attending public school? Are there legal constraints, imposed by state or local public officials, courts, or other authorities, which limit the district's ability to deliver the services to private school students called for in the plans, or to deliver services equivalent to those delivered in the public schools?

(Missouri, Wisconsin, and other states refuse to deliver Title I services to students on a private school site, and refuse to provide busing or teachers to usher the private school students to the public schools during or immediately after the schoolday.) Are there special problems, logistical or otherwise, that have made it difficult to deliver Title I services to the private school students? Do the Title I teachers adhere to the public or private school calendar?

8. Supervision. Who reviews the performance of the public school teacher assigned to instruct the private school students? Are there difficulties from the lack

of supervision, such as teachers not preparing, not arriving on time, leaving early, not receiving amenities provided by union contract with the public schools?

What kind of oversight and review of the private school program does the LEA carry out? What kind of contact has the district had with the SEA regarding the provision of services to private school students? What information does the LEA regularly provide the state about the private school students services? Does the SEA require the LEA to obtain the "sign-off" of private school officials on the application? Who signs for the private schools? Do the Title I program evaluations include examination of the private school component? What information do the evaluators require of the program provided for the private school students?

PROBLEMS IN SEA PRACTICES

We will discuss our findings, first on the SEA practices, and then on the LEAs.

Adequate monitoring of Title I service delivery to private school students by LEAs is a responsibility first of the U.S. Office of Education and second of the State Education Agencies, who are funded to administer and monitor the implementation of Title I within their borders.

Inadequate data collection. In our interviews with state officials, we found that very few states collected adequate

data for ascertaining whether private school students were included in Title I programs equitably. We found other SEAs promulgating eligibility formulae (which local districts outside the major metropolitan areas were required to follow) that substantially disadvantaged the private school students who would have been eligible for the program if equivalent criteria for eligibility been applied to their cases. Most states did not collect from the LEAs the data that would be necessary to ascertain that private school eligible for Title I were being identified, and being served to a fair degree.

Our findings are consistent with those of Gavel, Tallmadge, Wood and Binkley in their 1975 study of the data provided on State ESEA Title I reports for the previous six years. They found "over the six fiscal years, there was a decrease in the number of State Reports providing information on public versus non-public participation and the explanation for this is not clear....Twenty-three states (of those reporting) showed a decrease in the proportion of non-public participation over the six-year period, several states had no identifiable pattern or stayed about the same, and only four states showed an increase. Data on the percent of eligible non-public students served by Title I are not available in the State Reports."*

Gamel, et al, present evidence that the data reported by

* Nona N. Gamel, G. Kasten Tallmadge, Christine T. Wood, Joanne L. Binkley, "State ESEA Title I Reports: Review and Analysis of Past Reports, and Development of a Model Reporting System and Format," RMC Report UR-294, (RMC Research Corporation, Mountain View, California: October, 1975) pp. 61-62.

the SEAs is not useful for determining the adequacy of the LEA effort to serve the needs of private school students. They found that the states do not even possess information about the number of eligible students in the private schools, much less request information that would assure SEA monitors that the LEA had made a reasonable and effective effort to identify the eligible children in the private schools. Their study shows a disturbing drop in the proportion of private school students served in 23 states. Minority enrollments in the private schools actually increased in the period, and minority enrollments would be one reasonable indicator of the proportion of eligibles in the private schools. Hence, we cannot conclude that the enrollments dropped because private schools enrolled fewer Title I eligible students. Two likely explanations are:

1. The states became more careful in reporting the number of of Title I participants from the private schools. Some districts were cavalier with their statistics earlier in the Title I program, which would have been reflected on the earlier state forms.

2. The concentration of services within the private school sector could have been greater in the period (1) because in the beginning, private school students tended to be taught by more junior and therefore less expensive Title I teachers (so more students could be served under the same budget), but this practice began to change as the program aged and as systems began to lay off teachers;

and (2) because the private school administrators may have tended to concentrate services more than public schools did. This is certainly the case in New York City in the period.

As a consequence, it is virtually impossible for OE to have reliable counts of the number of eligible or participating private school students. OE's monitoring of SEA performances ensuring that private school students are served by Title I varies by OE regional office, but, for the most part, it is quite weak. OE auditors have more impact than the program monitors, but they have not reviewed program for failure to serve non-public school students. In some cases, monitors and auditors gave districts contradictory signals with respect to private school participation.

For some of the 43 districts, did the SEA have or collect any kind of comprehensive data showing whether each of its Title I LEAs was spending exactly or approximately proportionate amounts of funds on public and non-public school students according to a definitively determined needs assessment. One SEA Title I director pointed out that his USDE regional officer was against the use of any formula approach to local needs assessment. Another said that in his rural state there was such an equalization of poverty, minority groups, and educational deprivation in public and non-public schools, that as long as there were no local complaints, he would allow them to proportion services on the basis of school enrollment rather

than by conducting an actual needs assessment. The feeling was that if there were local problems, the SEA would eventually be notified of it (by alert private school officials or parents) and would step in and mediate the matter. The SEAs do not take the initiative on such specifics, relying on such general compliance items as attendance at meetings, lists of services that go to non-public schools, sign-off letters and the like. One SEA Title I director felt that his state compensated for this deficiency by publishing constantly what various LEAs and private school students were receiving, implying what others were not receiving.

Isolation of private schools. There are contradictions in the design of most Title I programs which make state monitoring more difficult. The fundamental problem with Title I is that it is a child-benefit program, but it is administered through the public schools. Private school cooperation is essential: Most states do not serve students whose private schools do not wish "to participate," even when those services are not given at the private site. Many states report that the private schools "choose not to participate." Despite the fact that the private schools do not receive then funds, nevertheless many systems establish budgets for the private school site and refuse to serve students at that site unless there is a sufficiently large number of them to warrant placing a full-time teacher there. Furthermore, although states treat the private school site as a whole for

the purposes of determining the number of eligibles. Only some of the students are tested for eligibility, others are not because they do not live within the correct public school attendance zone.)

Some SEAs have taken a legalistic position toward the involvement of the private school student. They require private schools not only to test, plan, and coordinate their participation in the Title I program—on their own and at their own expense—but they have attempted to make private schools legally responsible for errors the schools may have committed in identifying eligible students. Texas is attempting to recover the funds expended in support of some Catholic school students on the grounds that the students were ineligible by residence and the error was the Catholic system's. Such an approach by the SEA is guaranteed to discourage the cooperation of private schools even though Texas has designed programs particularly dependent on private school cooperation if the services are to be delivered to private school students.

Allocation of funds and services. States consistently permit the public systems to take money "off the top" of the Title I budget, for programs which do not include private school students, before allocating the remaining funds between private and public school students. Some states require districts to enforce the "minimal size" approach to site selection, and refuse to permit any allocations of

Title I funds to serve otherwise eligible students at private school sites of subminimal size. This is a particular problem for private schools, because they are typically smaller than public schools, and because not all their students can be considered eligible by residence.

Few states maintain lists of all private schools. Fewer than half the states require the public schools to list those private schools in their districts not participating in Title I (by choice). The SEAs have no lists of their own against which to check these "sign-offs." There is no evidence (or testimony) that SEAs investigate the refusal of the private schools to cooperate, or explore other means of serving their students. The SEAs in general have no programs designed to enlist the cooperation of the private schools, even though they approve LEA plans for involving private school students that require the cooperation of those schools.

Fewer than 10% of the states have the capacity to adequately monitor the participation of the private school students. The monitoring must begin with a census of the private school population by district, and a survey of that population to determine its eligibility by residence and by educational criteria. The state must determine the degree to which the LEAs' proposed approach to the problem of serving private school students depends upon the cooperation of private school teachers and administrators, and determine the steps the public system has designed to elicit that cooperation. There

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is, in other words, a requirement that the LEAs actively educate and recruit the support of the private schools if they have designed a program of services for students that depends on cooperation. Then the state must determine that the criteria used for identifying private and public school students eligible for the program is comparable. Then determine that equivalent standards for selecting participating students are applied, especially if the budget for the services to the private school students is a function of the number of students selected as participants.

If the budget is rather a function of the number found to be eligible, then the SEA can permit differences to occur in the proportion of eligibles selected as participants, and therefore in the criteria for selection and the kinds of programs delivered to each type of student. In essence, the LEA would be treating the private school students as something other than members of another public school in the system, as having problems which may be different from the public school's problems and may require a different solution. This attitude is closer to the reality of the situation. There is no necessary similarity between private and public schools in the same district, certainly no more similarity than between public schools in one district and in another. The SEA has decided that because of interdistrict differences, it is best for the public systems to design their own programs to fit their own needs, with their own criteria for selecting participants and their own decisions about degree of concentration of

services. The same type of differentiation in program is appropriate for students within the private schools in LEAs, for the same type of difference can be found between their school experiences and those of students in the public sector, as between students of two different public systems.

Integration guidelines. A substantial problem exists in the ambiguity of the Title I requirement that the Title I participating schools not discriminate racially in the selection of teachers or students. The Office of Education has held that the requirement applies to the public systems who receive the grants, and not to private schools whose students may be involved in the program. In the South in particular, the public systems have ignored what they consider to be segregation academies. (Even though 20% of these academies in Tennessee have signed the non-discrimination forms, the Tennessee SEA continues to consider them segregation academies, and continues to fail to deliver services to eligible students in those schools.)

Guidelines to be followed by the SEAs should be worked out by the Office of Education. If the program is in fact an aid to private schools, then the schools must file the requisite non-discrimination assurances. If the program is aid to public systems to treat the educational needs of all students within an area, it is incumbent upon the public system to integrate into Title I program, just as it must integrate its regular program of studies. Such an integration

could be accomplished while serving the eligible children, even if they are enrolled in segregation academies, within the present structure of Title I. (LEAs could, for example, establish centralized learning centers concentrating on special educational handicaps, serving several public and private schools in an area. The approach is followed in several locations for educational reasons, without a concern for the added benefit of the integration of the program.) SEA Title I officials indicated a clear belief that the LEAs had no obligation to provide Title I services to eligible students in segregation academies (or in any schools the SEA believed might be a segregation academy), and that to do so would simply deprive the public school of needed resources. Their position was not based on systematically collected information about the private schools, nor had they made efforts to introduce an appropriate, integrated Title I program to these schools. On the principle of refusing to deal with what they believed to be segregating schools, they failed to provide children with services to which they were entitled under the law, and thus failed in their responsibilities under the act. They also ignored the opportunity to introduce children in segregation academies to integrated educational experience in Title I.

In sum, the SEAs need direction and interpretation on a number of matters affecting the involvement of private school students. It is not generally recognized that the

states have an obligation to the private school students which is not discharged with the refusal of private schools to "participate." There are a number of issues concerning the definition of equity which need attention, especially the concept for planning for the potentially different needs of the private school students, the problems of "off-the-top" funding of programs designed solely for the public schools (such as Head Start), and the general problem of ascertaining that the private school students have been identified, surveyed, and that a legitimate attempt has been made to draw them into the Title I program. SEAs should be required to have proof from LEAs that private school students are surveyed, comparably to public school students.

PROBLEMS IN LEA PRACTICE

It is particularly important that OE issue the states guidelines on the establishment of the fair share of services which should be delivered to the private school students. The delivery of Title I services is controlled locally by the public Board of Education, as well as the Parent Advisory Committee (PACs), which are public school dominated.

Attitude of local officials. We found a prevalent attitude, not so much among Title I administrators as among the officials and political leaders of the public systems, that funds spent on private school students (even if given for that purpose by the federal government) were funds out of the pocket of the public schools. SEAs, LEAs, and the PACs

tended to this position.

The corollary was also true: Once the private school student portion of the budget was allocated, many LEAs tended to consider their responsibility fulfilled, and provided a different level of supervision and program direction to the teachers assigned to the private school students. Many districts establish private school programs which are only material and book programs. Districts frequently deny private school teachers inservice training which is part of the public school approach to remedial problems, and deny private school students use of special diagnostic and treatment centers and specialized equipment (often paid for "off-the-top" of the Title I funds, before distribution of funds to school sites, and therefore from the portion of funds private school students should share).

The allocation process. Many districts use extremely ambiguous approaches in determining how large a budget should be given to Title I participating schools. In one Southeastern county-wide district, the district clearly limits eligibility to those students in the target area (based on free lunches in the school vs. the county percentage for all public school students) who score below the 25th percentile on standardized tests paid for by Title I. The criteria are strict, but at least the same criteria are applied to all students. There are only three private schools in this county, so there is little difficulty in identifying the private school students

who might be eligible. However, the district is a consolidated one, and the three private schools cover the area of several public schools. Only those students residing in the attendance area of public schools identified as eligible schools can be considered for eligibility by academic criteria. There is a certain amount of arbitrariness in this, since the public schools do not have in the socioeconomic status of their students a markedly lower-income population than the private schools.

Next the schools recommend whom among the eligibles should participate in the program, according to clearly established criteria set up by the central Title I office. Although the criteria are clearly established, they leave a substantial amount of discretion to local school officials and central Title I officials. The budget for Title I is an allocation of funds per participating pupil. A school must have a minimum requirement for the program. The private schools are smaller than the public, and have their students scattered over a larger area and are therefore likelier to reside outside the more narrowly defined public school attendance districts. Private schools have a more difficult time reaching the minimal number of students necessary for a program under these relatively severe—and informal—rules.

Finally, the system offers only a remedial reading program. There is an apparent lack of consultation with the private schools in establishing the needs assessment of

their students, and planning the programs which will meet those needs. The private schools simply accept the program offered by the public system.

Splitting the budget, before private school students are considered. One of the last clear biases against the interests of the private schools is the allocation of budgets—and we not schools because it is only potential private school students who are discriminated against by this procedure, not actual students—is the practice of funding kindergarten programs with Title I funds. Kindergartens are used as recruiting devices by schools, as well as "Head Start" type educational programs. They have both institutional and educational functions. In one rural Southeastern county-wide system, the county Title I paid-for kindergarten services to half of all students of that grade level living in the target areas. The Catholic school (and three segregation academies in the county) also had kindergartens, but these were not funded.

The county then divided the remaining funds, on a proportionate basis, between Catholic and public school students selected as participants on the basis of standardized tests (eligibility being six months below grade level, a standard so high that all schools in the county receive Title I services) and further selection by the Title I staff. The program is taught by an itinerant teacher, so that the same teacher serves public and private school students with

the same program. The programs are essentially equivalent. The selection of participants is crucial to the determination of the budget. It is not possible to ascertain whether private school students are selected by the same criteria or are proportionate to the selection of public school students. All students in the district are eligible for the program on the basis of residency, since the county's busing program insures that an equal number of AFDC students attend all public schools in the county, so the entire county becomes a target area. Only 4% of the private school students are participants, but we do not have comparable figures for the percent of public school students who are participants, although 15% would be a reasonable estimate, given the level of concentration evident in the system. At the kindergarten level, 100% of the public school students and 0% of the private school students are served.

In one Great Lakes district, there were serious difficulties in the distribution of the resources. The private school students represented 12% of the Title I participants (and 12% of the eligibles, though 30% of the students in the district), but received only 6% of the system's Title I allocation for services to its students. The district claimed to distribute the funds equally on the basis of the number of eligibles in each Title I school, but the private schools received only one-half the funds they should have received proportionate to their percentage of Title I eligibles.

There is no evidence whatsoever of intentional bias, or that the district used some other figure in allocating funds to the public school Title I students. Rather, the problem stems from the fact that the district supports both Head Start and follow-through programs with Title I funds. Neither program includes private school students. These programs have total enrollments equal to 20% of the total enrollment in Title I, and are more expensive than the Title I programs. The funds for them come "off-the-top" of the funds for distribution for Title I services to the public and private eligible pupils.

Program planning. There are differences in the degree of participation between private and public school officials and parents in the planning of the Title I program. The law requires Title I programs to have Parent Advisory Councils established at each site of the Title I program, and one district-wide PAC. PACs can be established at private school sites, but do not have to be. Private school parents are to be represented on the district-wide advisory committee.

In most communities, public school staff cannot sit on the advisory committee, although they can provide the committees with staff services. The private school administrators can sit on the committees as the representatives of their schools. In most communities, the district wide committees appears to be made up of delegates from each school receiving Title I services, and one delegate from the private sector.

The private schools are typically outvoted on PAC decisions. However, the private school administrator can often wield disproportionate influence on the PAC, because of his or her expertise in the operation of the Title I program and familiarity with the procedures of school bureaucracies. Also, the private school student's representatives tend to have a more focused interest, more easily represented than the public schools. So it is possible the advantages and disadvantages of the representation of the private school students balance each other out.

The importance of the arrangements for representing private school students on the PACs is, of course, related to the importance of the PACs in the planning process. One rural Southeastern county district reported that the parents refused to consider the PACs as anything more than open houses to tour the schools. In another Southwestern school district, whose jurisdiction included several hundred square miles of mountainous Indian reservation lands, PAC meetings had to be held late in the evening so that parents could attend from 50 to 100 miles away. Meetings lasted many hours, following Indian tribal rituals and customs, which put some of the private school representatives from urban areas at a disadvantage. In many communities, the Title I staff leaves the design of the program in the private schools to the private school administrators and the Title I teachers assigned to those schools. The PACs approve these designs as a matter of

formality, but exercise much greater authority over the programs in the public schools. In one Great Lakes state, the PACs considered the Title I program a kind of parent-aid employment program, and provided one teacher aide for every 27 students selected, but only one teacher for every 146 students. The private schools, in contrast, had only one aide per 181 students, but one teacher for every 54 students. The district believed the private schools made better use of their Title I resources, in planning their program, than did the public schools, which were hampered by the PACs.

Experimental programs. Our survey covered districts with experimental Title I programs. One Southeastern urban district devised a Title I plan by which the definition of the target area depended solely on the academic achievement of the students in the school. All schools in the district were tested, and any school which had 35% of its students at or below the 30th percentile became a target site. Students in that school, or in private schools but residing in the attendance area of the selected schools, were eligible if they achieved at the 30th percentile or below. The private schools were not included in the calculations or the student populations of the public schools, for purposes of determining the target schools. This, in fact, is likely to have increased the chances of selection of schools with larger private school-enrollments in their districts as target schools, because the records of the district show virtually no private school students falling below

the 30th percentile (less than 1% of the private school students were eligible, compared to 12% of the public school enrollment eligible). If the private school enrollments had been included in the calculation of the public school averages (i.e., in calculating which school areas contained 35% of students at the 30th percentile or below), it is possible that the public schools identified as target schools would have been different.

In the two years we examined (1975-76 and 1976-77), the city experienced a substantial shift in enrollments from private to public schools. The public schools increased by 5,000 students, or about 9.5% in the year: the public school increase amounted to a doubling of the size of the first grade class, had the entire increase occurred in grade one enrollments—an unlikely case. The private schools lost 2,700 students, or about 26.4% of their students—a decline equal to the loss of the entire first three grades of the private schools' enrollments!

One curious aspect of the change in enrollments between the two systems is the fact that the private schools lost 130 eligible students in the course of their enrollment decline: their number of eligibles declined from almost 2% to less than 1% as a consequence both of their enrollment drop (or shift to the public schools) and of the change in the district's Title I plan to the experimental approach between the two academic years. The public schools, however,

increased their number of eligibles by 1,000 between the two years. The shift to the experimental plan had opposite effects in the two sectors.

The central Title I officials test both private and public schools for their eligible students, so it is unlikely there are systematic differences in testing accounting for the very low proportion of the private school students eligible for Title I services. In the selection of the students who should participate in the program, private schools do much better than the public school students. All private school eligibles are participants (in the experimental year, but only 42% in the previous normal-program year), but only 54% of the eligible public school students are chosen to participate. In the previous year, the situation had been reversed; 61% of public school students had been selected for participation compared to the 42% of private school students.

The private schools have substantial minority enrollments, although not as large as the public. Approximately 35% of the four schools chosen as sites in the private sector are minority students. Given the fact the minority presence in the private schools, the relatively large percentage of students from the town in the private schools, and the Title I practice of testing all students, it seems unlikely that less than 1% of the private school students would achieve at the 30th percentile or below. One possible explanation would be potential bias in the administration of the Title I program, its

tests or the selection of participants. But this is highly unlikely, because the private schools are consulted early in the planning process by the Title I director and because the Title I director was the former chairman of the Catholic school's Board of Education. In fact, the private schools in this district are well integrated into the Title I program, and are provided with some services—notably the testing services—not normally supplied to private schools by Title I programs.

One explanation is possible. That the district establishes private schools as sites only if 22 to 25 students at that school are eligible for services. The private schools are relatively small units, and 22-25 eligible students can be a large percentage of their population, especially given the fact that many students will be ineligible because they do not reside within the target area. The system is very likely to be reporting only those private school students eligible who are at schools the system selected as sites for programs. It is unlikely that the total eligibility of the private schools is being reported, although we cannot know for certain the system's practice from our interviews, or from the relatively detailed data supplied.

A decision about the minimal number of students at a site necessary to fund a Title I program can sharply affect private school participation. In this community, the system requires, in effect, that there be a demand for \$10,000 in

services at a school before that school will be designated a site, even if it has students who should be selected as participants on the basis of their eligibility and the degree of disability they have. The system explains that it applied the same standard to the public schools, but the public school units are larger and, by definition, every student in the public school is eligible by residence. There is no artificial shrinkage of the public school population by residency requirements, of the type that can substantially shrink the eligible private school population. There is no suggestion that the decisions about the minimum scale of the sites was made to reduce the amount of services delivered to the private school students, but that is very likely the effect of the decision. It is impossible to know for certain on the basis of the number supplied by the system. However, the information we have collected in this study is far more precise and detailed than the information collected by the SEA in its evaluation of the system's performance.

Nevertheless, even in this district private school students do receive fewer services, for reasons that are not clear. Both public and private school students receive one Title I teacher for every 46 students, but private school students receive no teacher aide services while public school students receive aide services in about the same proportion as teacher services.

Monitoring quality of service. Why might private school students show so many fewer hours of contact with Title I teachers than public school students? One explanation can be found in the example of a medium-sized Southwestern town which has a high percentage of brown and black minority students, and a poor white population which has the lowest income statistics in the town. The community has five Catholic elementary schools. Its Title I program provides services to the students of three of these schools on site, and two agency-run schools for neglected and delinquent children. The district identifies its schools by the "free lunch" data: Any public school with a higher percentage of students receiving free lunches than the district as a whole receives Title I services.

The district must have a minimum of 25 participating students before any services are delivered to its site. Funding is provided on a per pupil basis to each school in the public sector, for each eligible child. Children are eligible if they fall one year below grade level on a standardized test. However, not all eligibles are served—the decision is made about who is to be served by teachers and administrators at the individual public school, in conjunction with the Title I teacher. The Title I budget for that school appears to be loosely negotiated, depending upon the number of students all agree are eligible.

The central research and evaluation office conducts the tests in the public schools, and the central Title I office supervises the Title I teachers in the school. This central

role will increase in the future because the district is switching to a program basis for delivering services. The district will also become involved in the degree to which services are concentrated, and will require concentration of fewer students in the public schools. The picture in the public sector is one of extreme informality, even to the amount of funds delivered to each school and the proportion of each school's eligibles served. The programs vary by school, essentially designed by the school's own teachers and principals in conjunction with the Title I teacher.

Things are similar in the private schools. The district Title I office meets with private school leaders, informs them of the program, the eligibility requirements for their students, and the need for the private school to plan an acceptable program. The private schools return with testing data establishing the eligibility of their students. (there appears to be no question about whether the private school students reside in the target area; the students in both the private and public schools participating in the Title I program are heavily minority and poor white), and put forward a plan. They are funded on a per pupil basis, in much the same informal way that the public schools are funded.

Some of the private schools propose only reading programs, with no teachers. Others propose teachers. The teachers are essentially unsupervised by the public school Title I staff, although this will allegedly change in the near future. The

teachers work closely with the private schools in designing their programs and carrying out the services, much as they do with the public schools. An idea of the extent to which the Title I teachers work with the private schools can be gained from the offhanded comment of the central Title I director that "the private school Title I program teachers only this year realized that they were eligible for benefits negotiated for the public system teachers under their contracts. The teachers didn't realize they were employees of the public system."

In sum, the public and private school programs are handled with equal informality. There is great deference paid to the authority of the neighborhood schoolhouse and its teachers, on the ground that these educators know the students and their needs best. The program gives these administrators a great deal of discretion in identifying and planning programs for the participating students. In both sectors the budget appears to be informally established. The program gives substantially less supervision to the Title I teachers in the private sector, and much less direction. The private schools must plan their own programs, and if they do not, their pupils receive no services. The central Title I staff allows Title I programs to be established that do no more than provide books for students.

Given the informality of the program, it is virtually impossible to establish whether the private school students

receive an appropriate share of Title I resources, much less receive Title I resources equivalent to those given the public school students. The program may be quite good. (The central Title I staff praises the success of the private schools in their basic education, and give their high level of success as one reason for leaving them to themselves.) But it is not monitored and there is no way of establishing the equity of the distribution of resources within it. The approach does appear to fit the administrative and political reality of the public and private systems, and could not be changed without changes at the schoolhouse level of responsibility for an education program that appears to work well and to be strongly supported by the public. There will be, however, a substantial difference in the total contact hours with Title I teacher between the public and private school students, because the public school students have "contact" with supervisors who do not visit the private schools, and because the approved plan in the private schools includes at least one school, perhaps more, which receive only supplies with their Title I allocation.

Off-site services. There are four states in which Title I services to non-public school children cannot be provided to the children in the non-public school: Missouri, Oklahoma, Virginia, and Wisconsin. In these states the services are provided "off-site," at some site other than the non-public school campus. In each case, it is not the state education agency or the local districts that have

chosen to deliver the services in this manner. On the contrary, they have been ordered to do so by the states' attorneys general whose interpretation of state law requiring separation of church and state prevent the public school from delivering services to non-public school students on a parochial school campus. The state education agency (SEA) is required to enforce the ruling. The SEA, in turn, leaves to the local district the dilemma of how to serve the non-public school children without going into the school, but it requires the district to do so.

In most cases the non-public schools are anxious to see their children benefit from the services. In almost all cases the parochial schools are anxious to participate. The few exceptions are schools run by fundamentalist protestant groups. The schools run by the Lutheran Church Wisconsin Synod are such a case. The non-sectarian private schools give mixed responses. In general they are likely to have fewer eligible students. In Northern states the non-sectarian schools are likely to opt for participation. In the South, most non-sectarian schools are private academics established to sidestep the civil rights requirements. They give the impression that they want nothing to do with the federal government, and without exception they have refused to cooperate with local school districts on Title I.

While the experience of Title I in those states which require off-site services is not uniform, it nevertheless

contrasts sharply with states where services are provided on-site. And the contrast seems to be consistent among the off-site districts. The differences are both quantitative and qualitative. From a quantitative point of view, the non-public school students who are offered off-site services participate to a lesser degree than do the students in public schools. While this is probably true even for the "on-site" states, it seems to be true to a greater degree for the states in which off-site services are required. For example, this study compared the participation of students as a percent of enrollment in three school districts. In the first district, 20% of the public school students participated, and 2% of non-public school students participated. In the second district, 5% of the public school students participated, and less than 1% of the non-public school students participated. In the third district 8% of the public school students participated, and 1% of the non-public school students participated. In each case the non-public school participation was consistently lower. In the third case the difference is more dramatic than it might appear because non-public schools account for 25% to 33% of all students. One last point needs to be made regarding quantitative equity of services. In each of the districts, public and non-public school officials emphasized that school year 1976-77 was the first year that there was participation of non-public school students to any degree. Prior to 1976-77 participation of

of non-public school students was practically immeasurable.

Several factors account for the limited participation of non-public school students in these states. The first and most important fact is that of control. Non-public school administrators are usually not involved in either the planning or the administration of the program. In most cases, non-public school administrators say that the limited service their students received came only after a period of tough negotiations. In no case did a district have a working relationship with more than one non-public school principal. In states where non-public school students receive more equitable services, cooperation between the district and the non-public school administrator is a significant factor. In fact, the absence of a working relationship probably underlies many of the other factors. The second factor is the lack of parental involvement in the Parent Advisory Committees (PAC). PACs can often be an important factor in shaping the Title I program. Where parents of non-public school students are actively involved in the PACs, the non-public schools seem to benefit to a greater degree. In the states where off-site services are required, parents of non-public school students participate to a limited degree. Usually they are asked to attend the PAC meeting at the public school where the child receives Title I services. In no case is there a PAC at the non-public school.

The third fact which tends to discourage participation is the matter of site. In no case are Title I services delivered on the non-public school campus. One district administrator put the problem this way. "The State leaves the method of delivery up to the district, but they are very strict on our not going into the classroom." Districts choose one or a combination of three methods of delivering services to the non-public school students. It is hard to say which is the most effective or the most popular, because none of them are. The first method is one of providing Title I services at a centrally located public school during a summer school session. The second is making services available during the school year in a neighboring public school. The third is bringing curb-side services to the non-public school in the form of a mobile van. None of these methods is very convenient.

The fourth factor is related to the third. In no case were non-public school students provided transportation to the Title I site. In one case transportation was provided only if it were requested. In another case the lack of transportation jeopardized the safety of the participating children because they were required to walk through heavy downtown traffic to reach the service delivery site.

The fifth factor is the quality of services. This factor can be measured by whether the student-teacher relation is comparable, whether the time made available per student is

comparable, whether the same grades participated, and whether the same subjects were offered. These factors were very difficult to measure, and the measurements were difficult to interpret because of the limited participation of non-public school students. For example, while the student-teacher ratio for the non-public school program compared favorably with the public school program, it was interesting to note that there were underlying reasons for that. One reason was that the mobile lab which almost all districts used could only accommodate six students at a time. Another example, is the one of comparison by grades. In the public schools kindergarten students received Title I services. In the non-public schools, there may not have been kindergarten, or if there was, the students did not participate. The last example is eligibility testing. In those districts where the Title I paid for the testing, the district was required to test the non-public school students. In those cases the district said they had a difficult time determining which students to test. Furthermore, once they identified the students they intended to test, they were required to test them in a public school.

In summary, providing services off-site provided too many points at which there could be student attrition. The lack of a suitable working relationship between the public and non-public administrations promoted attrition. There would be some attrition because the parents were not actively involved. There would be some attrition because the service

delivery sites were not convenient.. The lack of transportation required that the students take more time to get to the classes, and their walking to the classes was not safe. This was likely to discourage some students. The mode of delivery, the mobile lab, by design, limited participation. Last, not knowing which students to test further limited it. Even in the public school system there are probably some factors which lead to student attrition. In the case of off-site services to non-public school children, however, they are many more. There are just too many.

By-pass. By-pass provisions were being considered in four states at the time of our field interviews. In one state, Wisconsin, the public and private authorities worked out an agreement within the provisions of the state and federal law. By-pass has been invoked in Missouri and Virginia. It has been implemented in Missouri over a three-year period, with each succeeding year adding a larger number of smaller districts to the by-pass plan. By-pass is invoked when the state officials declare that Title I services cannot be delivered to the private school students in an equitable manner, within the requirements of the state laws and Constitution.

The typical problems are those found in Virginia, Wisconsin, Oklahoma, and Missouri and a few other states, where the state laws prohibit dual enrollment, or the placement of public school teachers on private school premises,

or the delivery of public-school-owned materials, texts, etc., to private school premises. Often the laws prohibit the transportation of private school students by public school buses as well. In effect, private school students can participate in the Title I programs, in these circumstances, only on the public school site, after regular school hours, on Saturdays, or during the summer. The arrangement deprives the private school students of the full integration of the Title I program into their course of studies, marks them as a special set of students against the intent of the law, provides them with educational services at a time when they are least likely to be able to absorb the lessons (because they are tired at the end of the day).

As a practical matter, the off-site approach required in these states effectively blocks the consultations between public and private school teachers necessary for the effective planning and execution of the Title I program. The approach requires a substantial expenditure on the part of the private school students in order to take part in Title I services, in many instances, since the private school students must travel to the public school site—which in the rural areas can be many blocks or even many miles—by their own resources. The travel is unchaperoned by public school personnel and may subject private school students to substantial travel hazards. Schools in several locations have reported parent resistance to sending their children to public schools, seen

as a center of problems threatening their children's safety. Private school children are reported to have been hazed on the public school sites by students meeting them going to and from the public schools. Those systems providing after hours, off-site services for private school students at the public school sites typically employ regular classroom teachers or Title I teachers who have already worked a full course day, so the students do not receive the full energies of the teacher. Given all these obstacles, the record of off-site services is that they are generally of much poorer quality than those given public school students enrolled in the program, and that very few of the eligible private school students identified as potential participants do in fact participate in the program.

In a variation of the problem, some districts prohibit services on private school sites, but do use Title I funds to transport private school students to the public school site. However, these districts have frequently charged the cost of the busing to the private school portion of the Title I budget.

In those parts of Missouri and Virginia where Title I by-pass is being implemented, the Office of Education has issued RFPs seeking contractors to provide services to private school students. The contractor must plan for the services with the private schools, almost as an LEA would, except that the contractor is limited to providing only

those services provided in the public schools. Thus the public system continues to have a substantial impact on the Title I program delivered to the private school students even under the by-pass condition.

The contractor normally provides services at greater cost than those provided by the public systems, at least in the area of these two states, first because the contractor is able to charge as a fee for management services a percent of the total cost of the program, and because the contractor must, in essence, duplicate many of the management services already provided by the public systems for their own Title I program. The overhead expenses are, therefore, unavoidably greater than the public school would incur if it delivered the services itself.

Finally, the management company must pay salaries to teachers in accordance with the prevailing union wages in the area, which are often higher wages than those paid by the public school systems for their Title I teachers. The extra costs of the Title I services caused by the by-pass procedure are charged to the public school system, and are subtracted from the total grant of the public schools. In addition, a proportionate share of the funds available for student services are withdrawn from the LEA grant and used as the budget for the private contractor who is delivering services to the private school students. The level of concentration of services, cut-off, etc., are essentially set

by the public school system, but in communication with the Office of Education or its contractor, in as much as the criteria set for selection, and the concentration established in the program, affects the private school program as well as the public school programs.

By-pass thus benefits the private school students, but produces a more inflexible program for the private schools, and one in which—at least formally—they have less opportunity to formulate on crucial matters such as the degree of concentration (the decision already having been made by public school officials). For the public school, the program means, at the least, a greater loss of funds than simply the funds going to serve the direct education expenses of the private school students enrolled. Its Title I grant must also pay the administrative costs of the program and the management fee, over and above the actual cost of delivery of the services (a cost plus contract).

In the earlier years of Title I, some districts and state agencies took a recalcitrant attitude towards working out their problems with the private schools, with little worry that any effective sanction could be imposed against them for their resistance. At worst, the districts would be faced with a by-pass, a procedure which they believed—and it is clear, believed in error—would simply remove from them the headache of dealing with the private schools. Only after Title I was implemented, and the size of the management costs

that would be extracted from the LEAs budget were made clear to the public school officials did they begin to look for alternatives to by-pass more seriously. Several Wisconsin districts originally planning to acquiesce in by-pass actions have recently decided to devise a means of accommodating the private school students within the public school program rather than suffer the pains of by-pass.

AN ALTERNATIVE APPROACH

The present system of treating private schools as school sites, within the terms of the program, for some purposes (such as the establishment of a minimum-sized program), but not for others (such as, the identification of target area) whipsaws the private sector. Tying the planning of programs for private school students to public systems without regular means of communication with the private sector in practice substantially lowers the quality and appropriateness of the planning and design of the program serving private school students.

Another approach, which may have to be authorized by Congress, suggests itself. The public schools could be made free to treat the private sector schools as if they were LEAs themselves, setting up an administrative unit of the public system to establish programs at Title I sites at private schools. The Title I sites would themselves be given geographic boundaries (the boundaries of the public school's Title I sites at the private school locations) which would

coincide with those of the private schools themselves and would be target areas for the purposes of the legislation, in exactly the same fashion that the public school attendance areas are now used to define target areas for the public school students.

This approach would eliminate the arbitrary and essentially absurd mapping of private school students into public school attendance districts. (One Chicago elementary school found itself in 153 neighborhood school districts; one Long Island Catholic school found that it shared Title I programs with five different public school districts, employing five sets of Title I teachers on site.) For schools that draw from a large area (and so cannot be defined as drawing from an economically impacted area, an experimental approach of relying on achievement or family income characteristics, or of some combination of both, could be attempted. Or schools could be eligible if their attendance area falls within (or includes) a certain percentage of public school target areas.

Under this approach, the planning for Title I in the private sector could be designed to fit the needs of the students and their schools (which must cooperate in any successful program) to the same degree they now fit public schools' needs. The approach would place the private schools on the same organizational basis as it places public schools under the approach followed in the majority of school districts, which is to establish programs relatively indepen-

dently designed for each site. The approach would force fewer administrative adjustments within the private sector, and lessen the need for political rivalries. It would put the distribution of funds to the private school students' needs above the political controls of the Board of Education or the PACs, in much the same fashion that the distribution of funds to the various school districts of the state is above the control of the SEA or of the school districts themselves.

CONSTITUTIONAL CONSIDERATIONS

The Supreme Court has slowly developed an interpretation of the strictures the First Amendment imposes on state support of non-public schools. The child-benefit approach of Title I—the approach primarily responsible for the substantial regulative impact of Title I on local public school systems—was adopted to meet Supreme Court rulings. The Court has recently begun to consider the child-benefit approach in more detail, and its rulings will affect the future shape of Title I. The following memorandum "Title I Programs and Constitutional Adjudication," by George Anastaplo, sets out the directions the court is taking which may alter the involvement of non-public school children in Title I. (For the complete text of the Anastaplo memorandum, see Appendix A.)

Title I Programs and Constitutional Adjudication

George Anastaplo

I. The opening lines, in the Opinion of the Supreme Court of the United States in *Wolman v. Walter* (June 24, 1977), read, "This is still another case presenting the recurrent issue of the limitations imposed by the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment. . . . on state aid to pupils in church-related elementary and secondary schools." 45 U.S.L.W. 4861-4862. These lines remind us that it has long been difficult to determine with assurance what the law in this matter is and what it is likely to be.

Our immediate concern in attempting such a determination is with Title I programs, particularly as they appear in the light of what the Court has said and done in *Wolman v. Walter*. I take as a useful description of the Title I programs for this purpose Thomas Vitullo-Martin's draft report to the Compensatory Education Evaluation Section, National Institute of Education, "On the Comparability of the Involvement of Non-public School Children in ESEA Title I Programs" (August 16, 1977), p. 13:

Title I of the Elementary and Secondary Education Act of 1965, as amended in 1974 (also known as the Compensatory Education Act), is broadly formulated to provide remedial education services to children whose education is hindered by their environments. Public school districts, at their discretion, may request to be considered a "local education agency" (LEA) to administer Title I. Title I charges LEAs with responsibility for delivering remedial education services to eligible children within their jurisdictions. All children meeting standards (relative to the local community) for residence in low-income areas, and low rates of scholastic progress are eligible for the program. Eligible children may attend public or private schools or various types of juvenile institutions. Their eligibility is not a function of the type of institution they attend. Allocations are made to states and qualifying sub-units by a formula which considers each area's low-income school age population, weighted by the count of children receiving supplemental public aid. Hence, all children residing in an area are counted for purposes of establishing the allotment. The allotment is not determined by the public school registry, or even by the register of all schools in the area. It includes non-public school students and children not attending school.

II. To devote myself primarily to *Wolman* in this memorandum is not to deny that various of its pre-

decessors may be more critical. But its predecessors do come to bear on this problem, at least for the moment, as they are reinterpreted in *Wolman*. One suspects that these matters keep being raised, and keep being reinterpreted, because they have yet to be settled correctly. Certainly, legislation has again and again to be reviewed in the wake of repeated adjustments by state legislatures to judicial determinations.

Thus, the statute considered in *Wolman* was an attempt by the Ohio legislature to provide aid to church-related schools (or to the students of such schools) in forms which would conform to the strictures laid down in *Meek v. Pittenger*, 421 U.S. 349 (1975). It is quite evident in these cases that an effort is being made by supporters of non-public schools to draw upon public treasuries (federal as well as state) for some support of their schools.

That is, the rising cost of running all schools and the growing competition for children of school age have moved non-public school supporters to try, even more vigorously than before, to secure for their schools some of the money non-public school parents and supporters pay as taxpayers. These advocates confront, however, determined resistance by those who regard any allocation of public funds for these purposes to be a blatant, and serious, affront to the constitutional principles incorporated in the First Amendment. The issue becomes, then, that of "fair shares" against "religious liberty."

III. The Court in *Wolman* held constitutional "those portions of the Ohio statute authorizing the State to provide non-public school pupils with books, standardized testing and scoring, diagnostic services, and therapeutic and remedial services." It held unconstitutional "those portions relating to instructional materials and equipment and field trip services." 45 U.S.L.W. 4867.

It is perhaps instructive to notice just how much support on the *Wolman* Court the public funding of each of these six items had:

1) Diagnostic services (on-site)	8 votes
2) Therapeutic and remedial services (off-site)	7 votes
3) Textbook loans	6 votes
4) Standardized testing and scoring services	6 votes
5) Field trip services	4 votes
6) Instructional materials and equipment	3 votes

Various other disbursements seem to be temporarily "settled." The Court can be expected to be unanimous, or virtually unanimous, that tax exemptions for the property of church-related schools and the publicly funded provision of bus rides, free lunches and public health services remain constitutional. Thus, Justice Marshall, who dissented (for the most part) in *Wolman*, suggested that the line "should be placed between [1] general welfare programs that serve children in sectarian schools because the schools happen to be a convenient place to reach the programs' target populations and [2] programs of educational assistance." 45 U.S.L.W. 4869. (He questions the propriety of the textbook loans which go back to *Board of Education v. Allen*, 392 U.S. 236 [1968].)

Still other disbursements also seem to be temporarily "settled" (but in another way.) A majority of the Court, as currently constituted and on the basis of current precedents, can be expected to continue to hold that any direct financial support of church-related schools or teachers, or, it seems, any tuition reimbursements of the parents of church-related school children, is unconstitutional. (The field trip services and the provision of instructional materials and equipment were said in *Wolman* to look too much like such direct financial support.)

Two sets of factors seem to be taken into account by various members of the Court. One set has to do with the on-site, off-site distinction; the other has to do with the public health services, educational program distinction. The more the publicly funded activity looks like public health services, the more likely it is to be upheld. Also, the farther the publicly funded activity is from the site of the church-related school, the less vulnerable it is. Thus, if the critical decisions about the contents of textbooks or of tests are made elsewhere than in non-public schools, then that is somehow more like the public disbursement of health services, less like public interference in the educational policies of church-related schools. (Are field trips, despite their separation from the usual school site, too much like educational programs? Does the school site somehow move with the bus used for the field trip?)

IV. The student of these cases, as he attempts to make sense of them, sometimes suspects that their disposition—the determination of what is permissible, what is not—is somewhat arbitrary. Indeed, one might wonder whether the Court got off on the wrong foot from the outset of the modern development in *Everson v. Board of Education*, 330

U.S. 1 (1947). Did it get off on the wrong foot, not in the disposition of *Everson* (which permitted the funding of bus rides for parochial school children) but in some of the language of *Everson* (which assumed that aid to the educational activities of a church-related school is, for constitutional purposes, also aid to the religious mission of the church sponsoring the school)?

The *Everson* language is drawn upon by Justice Stevens in his (mostly dissenting) opinion in *Wolman*, when he says, "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 45 U.S.L.W. 4870. "Under that test," he goes on to argue, "the financing of buildings, field trips, instructional materials, educational texts, and school books are all equally invalid. For all give aid to the school's educational mission, which at heart is religious." But he does concede, as has Justice Marshall, that "the State can plainly provide public health services to children attending non-public schools. The diagnostic and therapeutic services [here] may fall into this category. Although I have some misgivings on this point, I am not prepared to hold this part of the statute invalid on its face." *Ibid.*

Thus, Justice Stevens lends tentative support to the provision of on-site diagnostic services and to the provision of off-site therapeutic and remedial services. Justice Marshall provides support only for the former. And Justice Brennan supports neither service in the context of a statute which he considers constitutionally offensive in its entirety. Indeed, one suspects that this substantial minority of the Court might wonder also whether the Court got off on the wrong foot in *Everson*—not in the language, however, but in permitting even the funding of an innocuous bus service which has led to various other exceptions to what had started as salutarily comprehensive separationist language. That is, these members of the Court might now wonder whether Justices Jackson and Rutledge were correct in their original *Everson* dissents.

V. Justice Brennan seems particularly appalled by the amount of money provided by the Ohio legislature for the program being approved by the Court: "[I]ngenuity in draftsmanship cannot obscure the fact that this subsidy to sectarian schools amounts to \$88,000,000 (less now the sums appropriated to finance [the field trip services and the instructional materials and equipment]) just for the initial biennium." 45 U.S.L.W. 4868. Justice

Stevens responds to this concern: "Like my Brother Brennan, I am concerned by the amount of money appropriated under this statute. But since the Court has invalidated so much of the program, only a much smaller amount may still be involved." 45 U.S.L.W. 4870, n. 4.

I cannot tell from the opinions precisely how much of the appropriation is left standing by the Court. It does seem to me, however, that it is closer to Justice Brennan's \$88,000,000 than to Justice Stevens's "much smaller amount." Be that as it may, is it not evident that hundreds of millions will now be directed, in state legislatures across the land, to those activities which seem (at least for the moment) to be constitutionally permissible? And as that happens, will that development oblige the Court to reconsider the expenditures of public funds it has permitted to be made on behalf of students in church-related schools? Will expenditures of that magnitude oblige the Court to decide, "once and for all," what is to be considered authoritative in *Everson* and its progeny, the comprehensive language of the expanding exception?

Insofar as magnitude of expenditures makes some Justices of the Court particularly sensitive to constitutional concerns, however, we need not wait for increased state expenditures. There are the already vast expenditures under the Title I programs first established by Congress in 1965.

VI. What, then, should we expect from the Court if it should review the Title I programs? May the magnitude of the expenditures themselves make it appear that the American taxpayer has inadvertently stumbled into the business of heavily subsidizing the educational activities of church-related schools? Or will the specialization of these expenditures, directed as they are to poverty-related deficiencies, be seen as essentially a public-health-like service, if not even as a kind of affirmative action effort (insofar as poverty is related to racial discrimination)?

There is little one can safely predict about precisely how the Court is apt to respond to the sheer magnitude of expenditures under Title I. The Justices can range in their responses from "My God! What have we let ourselves in for?" to "This has been going on for a decade now—and it seems to have had little or no adverse effect on religious freedom!" But that the Court would completely invalidate the Title I programs, as they bear on the church-related schools, seems to me highly unlikely. Conditions may be laid down, however, and more restrictions may be insisted upon.

One critical problem is likely to be whether educational aids can be provided on-site for standard performers in the church-related schools. *Wolman* does permit diagnostic services on site, but it emphasizes that the therapeutic and remedial services it permits happen to be off-site. (Some of the Justices wondered whether a mobile unit next to a school is really "off-site.") On the other hand, to insist that delivery of the considerable services (under Title I) be off-site may be to insist upon considerable interference by government with the normal administration and activities of the church-related schools. Such interference could be so considerable as to have constitutional significance. Should, then, the on-site prohibition be waived?

Yet once the Court permits obvious educational services, even though of a remedial character and even though performed by public employees, to be delivered on a large scale at the site of church-related schools, relatively little may seem to be left of any constitutional restriction upon public support of the educational activities of church-related schools. Indeed, the only thing then effectively prohibited would be direct financial support of such schools and of the teachers therein. The constitutional prohibition of even such support might then begin to seem artificial, especially if it should become evident that payment of money can sometimes be the least disruptive form of public aid!

Thus the arguments back and forth can be expected to go. It remains to be seen, therefore, whether the Court is prepared to ratify explicitly (and with what consequences) the delivery of publicly funded educational services on the premises of church-related schools not put in the guise of the "general welfare" programs that even so strict a separationist as Justice Marshall seems reconciled to.

VII. Is it not unlikely that programs as massive, and evidently as popular, as those provided under Title I for impoverished school children are going to be struck down for any reason at this stage of our political development? But is not the continued funding of these programs by Congress contingent upon a substantial share of the programs being made available as well to impoverished children in church-related schools?

It does seem to me rather unlikely that the Court, in the foreseeable future, is going to be willing and able to stand by any insistence that massive federal funding is *not* to be made available for elementary and secondary education in this country. But would not the denial of such funds to the support of some of the educational activities of

church-related schools have that effect?

That is, the critical factor to consider in predicting how the Court will eventually come to view these matters—especially since relevant constitutional doctrines here are, to say the least, somewhat flexible—the critical factor may well be implicit in the Roman Catholic argument reported by Professor Vitullo-Martin on page 4 of his draft report: Parents who send their children to private schools pay twice for education at the local and state levels; they will not permit the same pattern to be established at the federal level. Thus, federal funds will support either public and private schools together or they will support neither.

CONCLUSIONS

This study has shown that, in general, ESEA Title I is implemented by public school systems in a way that provides fewer services to eligible private school students than it does to eligible public school students. There is a great amount of variation in how the program is implemented at the LEA level, and this condition is not found in all districts. New York City in particular follows an extremely even-handed approach in its administration of Title I services, and has the most administratively formalized program of all cities reviewed for this study. Other communities deliver absolutely equivalent amounts and qualities of services to private school students with very few of the formal procedures and explicit rules and standards found in New York. Other cities, some with the largest private school populations in the nation, can only be described as derelict in their responsibility to eligible students enrolled in private schools. Still others recognize their duty, but have been blocked in their attempts to deliver services by interpretation of state laws and state constitutions—remnants of religious strife in earlier times which are hostile to private schools, and effectively prohibit cooperation between private and public schools.

There are essentially two issues in the delivery of services: How much should be delivered to private school

students, and what should the quality of services be? There are many points of administrative decision in the implementation of Title I that will effect the amount of funds or services an LEA will assign to the use of private school students. The key points have been identified in Chapter 4, and discussed at length throughout this essay. In most cases, existing regulations and the application of the existing law, will correct the problems we found with an equitable division of the Title I resources between public and private school students. For example, the practice of one Western city of determining the private school allocation of Title I funds from the known proportion of private school students who receive AFDC payments is a particularly flagrant and egregious violation of the rules. There is no warrant for such a restrictive allocating process, a standard for distribution of services substantially more restrictive than that employed by the federal government to distribute funds to the LEA. The allocation process should not have passed review at the SEA level, and should have been corrected by the Regional OE office, particularly since the city was the home-city of the regional office, but it was not corrected during the first ten years of the program. A substantial portion of the problems with the quantity of services allocated to private school students would be corrected with any effective program of monitoring by SEAs, regional OE office reviews, and OE Audit Reports. OE has no effective procedures for these

reviews, and does not require states to collect the necessary information for making a determination that private school students are appropriately served. The SEAs do not collect this information independently of OE requirements.

Another problem—that the proportion of federal Title I funds spent on public school students exceeds that spent on private school students—is the result of LEA practices which may or may not be appropriate. These, too have been identified and commented on throughout the study. The most prevalent practice is that of expending large portions of the Title I funds coming to the LEA to fund special programs in which private school students cannot be involved (often programs in direct competition with the private schools). The private school students then share a substantially reduced allocation for normal Title I services equitably with the public school students. For example, one large Midwestern city funds special magnet schools with Title I, using Title I funds to double the per pupil allocation of these schools. There are no comparable programs for the private school students. Another district funds kindergarten classes for half of the students in the county residing within the target area. The private schools in the county operate their own kindergarten classes (which have the effect of recruiting students for the elementary schools of either the private or public sectors). These classes absorb one-quarter of the county's Title I allocation. Is this a fair division

of Title I services? An individual, eligible, third-grade child in the private schools has no less a chance of receiving services in either of these two cities than a similar child in the public schools. But the public schools have appropriated for the exclusive funding of their own programs a significant portion of the Title I funds. Where would the limit naturally be? If the LEA devoted all its funds to a combination of Head Start, follow-through and special magnet schools, and had no funds remaining for distribution to children in the regular elementary or secondary programs, would the private school students be unfairly treated by the program? In several states, the public school decision about what portion of their school population they will aid with the Title I funds is affected by state programs of aid which are concentrated on specific grade-levels within the schools. For example, it is of no great importance in one Eastern state to concentrate Title I funds on high school students because the state already provides a program of special aid at the high school level for the public schools. But the program does not include private school students. The LEA's Title I program therefore does not include high school students, and the private school students are deprived of services available if they attended the public schools by a planning decision of the public schools which did not take into account their needs. OE must issue guidelines to the districts to clarify ambiguities in what constitutes an appropriate division of the Title I services

between public and private schools.

The second major issue concerns the quality of the services delivered to the private school students. Here we approach a more fundamental flaw in the design of Title I. Essentially, the quality of the program depends on its planning, on the investigation of what needs to be done and how to do it. Proper planning must take into account the individual disabilities of the child, in relation to the child's regular course of study. A child's most pressing need in remedial education is necessarily a function of his or her regular course of studies, at least in part, since the remedial service must either reinforce instruction already being given the student, or must provide instruction not given in the student's regular program. The Title I law, in its initial design, assumes that the public systems can and will carry out this planning. The planning requires the private schools participation. In fact, the public school can only take its planning direction from the private school, since it has no independent means of ascertaining the students' needs and existing program.

A competitive spirit between private and public schools has characterized the entire history of American local education. In the past, private and public schools coordinated and cooperated on educational problems only in a limited manner, and for every district with close cooperation, there were several with no interaction whatsoever. This attitude is prevalent throughout the Title I program. Public school

administrators frequently repeated the observation that the more eligible students they found in the private sector, the fewer services they could deliver to "their own" students. The planning problem is similar. In only a handful of districts were private schools consulted on the needs of their students at the outset of the Title I planning. In most jurisdictions, planning means figuring out with the private schools how the course of studies outlined by the public schools to meet the needs of their own students can be applied to the needs of the private school students. Even this formulation is considered advanced planning. More often private schools are simply told what the LEA plans to do, with no effective consultation. The problem of planning is endemic to the existing design of Title I. Title I could only effectively deliver services to the private school students if both public and private schools formed a single administrative team.

This last requirement raises serious concerns for the future autonomy of the private schools. From our research, we conclude that the program has been effective in bringing together private and public schools, and as the reforms suggested in this research (or other reforms) are implemented, the public and private schools will become even more coordinated and similar. We have already observed a "mirroring" impact of the program on private schools, whereby private schools are being forced to adjust their own administrative approach to mirror the public school bureaucracy to more

effectively deal with the Title I program. This coming together of the schools is not necessarily an ill-effect, but it is not a considered effect of the program—and it should be. Is it an outcome desired by the supporters of the Title I program?

Even within the existing Title I law, an approach could be taken that would simplify the implementation of the program and reduce the pressures on the private schools to become more like the public. The public system could declare the private school attendance areas to be public school Title I attendance areas (which is, in effect, its approach to the public schools—Title I declares the public school attendance areas to be Title I attendance areas for purposes of establishing residency requirements for the program). The public system could then establish an administrative unit of its own to plan and execute a program or services to private school students, much as New York City's office of private schools administers Title I services to New York City's private school students. The relation between the public system's own Title I program and the special sub-unit dealing with private schools should be similar to that between the SEA and the LEA. There need be no close integration of the programs—truly separate planning would likely produce programs in the private and public sectors at least as diverse as those found between neighboring public systems

right now—so long as the initial allocation of services between the private and public schools were properly executed.

This approach might mean that public school students and private school students living in the same neighborhood might not be equally eligible for Title I services on the basis of their residency, but that problem is insignificant in comparison to those found in the present situation, where half a private school might be ineligible because it does not reside within the public school attendance area. Since the division of resources between public and private schools would be, by formula, much of the rivalry the program has generated between the public and private schools would disappear—particularly on the side of public school administrators who see that their administrative decision can increase or decrease the services to the private school students.

This is a reform within the present structure of Title I. In the Constitutional review that is part of this study, we stated that the current Supreme Court interpretation of the First Amendment, which has produced the child-benefit approach, is a relatively new position on the Amendment, and that the court's own interpretation is evolving. The existing position was developed by the court in substantial ignorance of the operation of educational programs in the private and public schools, and with insufficient reflection upon the

traditional and appropriate state concern for the moral
education of our society's youth.

TITLE I FUNDS, CHURCH-SPONSORED SCHOOLS AND THE FIRST AMENDMENT:

FROM CHILD-BENEFIT TO COMMUNITY-BENEFIT?

by George Anastaplo

Lecturer in the Liberal Arts,
The University of Chicago

Professor of Political Science and of Philosophy
Rosary College

University President's Distinguished Visiting Professor
Memphis State University

This memorandum has been prepared as part of a study, "The Participation of Private School Students in ESEA Title I Programs," under a research contract sponsored by the National Institute of Education, Compensatory Education Division, Department of Health, Education, and Welfare. (See page 76.)

The Principal Investigator for the overall study is Thomas W. Vitullo-Martin, Consultant to the Council for American Private Education, Washington, D. C.

The author of this memorandum, George Anastaplo, is solely responsible for the opinions herein expressed.

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TITLE I FUNDS, CHURCH-SPONSORED SCHOOLS AND THE FIRST AMENDMENT;

FROM CHILD-BENEFIT TO COMMUNITY-BENEFIT? *

by George Anastaplo **

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

--The First Amendment

Section I. The "welfare" character of Title I programs

The expenditure of public funds in connection with church-sponsored schools¹ can be counted on to arouse serious constitutional concerns among us.² Any programs which do arouse such concerns are likely to face difficulties, if only because the United States Supreme Court is somewhat unpredictable in these matters. But constitutional questions are less likely to be critical here, it is sometimes said, if public funds are spent on students rather than on the church-sponsored schools themselves--and it is this assurance that we will consider on this occasion.

The publicly-funded programs which require discussion, in this memorandum, of the Religion Clauses of the First Amendment are the expenditures on behalf of students in church-sponsored schools pursuant to Title I of the Elementary and Secondary Education Act of 1965, as amended in 1974.³ The enactment of this legislation has been described in these terms:⁴

/President/ Johnson's decision to push for health and education legislation ahead of housing proposals and the granting of home rule to the District of Columbia resulted from his carefully considered judgment as to the amount of time each of the bills would consume and which measures were most likely to provoke the

The notes for this memorandum begin at page 76, below.

kind of debate and controversy that would drain valuable energy. Recognizing that John Kennedy had lost a full legislative year in pursuit of federal aid to education, Lyndon Johnson refused to let the education bill go to the Congress until administration officials had secured the agreement of two major lobbying groups--the National Education Association, which spoke for the public schools, and the National Catholic Welfare Conference, which represented parochial schools. The seemingly irreconcilable conflict between these lobbies had been largely responsible for the earlier failures to pass an education bill. Now an agreement was fashioned by means of an ingenious formula by which assistance would go, not to the schools, but to impoverished children, whether they attended P.S. 210 or St. Joseph's. Immediately thereafter the President dispatched the program to the Hill, and within four months the Elementary and Secondary Education Act was the law of the land.

The act itself has been described in the following terms by the scholar who is perhaps most familiar with the intricacies of delivery of Title I services to children attending private schools:⁵

Title I of the Elementary and Secondary Education Act of 1965, as amended in 1974 (also known as the Compensatory Education Act), is broadly formulated to provide remedial educational services to children whose education is hindered by their environments. Public school districts, at their discretion, may ask to be considered "local education agencies" (LEAs) to administer Title I to all eligible children within their jurisdictions.

All children meeting standards (relative to the local community) for residence in low-income areas and low rates of scholastic progress are eligible for the program. Eligible children may attend public or private schools or various types of juvenile institutions. Their eligibility is not a function of the type of institution they attend. Allocations are made to states and qualifying sub-units by a formula which considers each area's low-income school-age population, weighted by the count of children receiving supplemental aid. All children residing in an area are counted for purposes of establishing the allotment. The allotment is not determined by the public school registry or even by the register of all schools in the area. It includes non-public school students and children not attending school.

The child-benefit approach is fundamental to Title I. The law designates LEAs to deliver diagnostic and remedial educational services (to correct children's educational problems defined by the act) to children defined by the act as eligible. In most cases, public school districts become the LEAs under the act, but the Title I assistance is in no form general aid to a school district. Districts must apply for the funds available to their area by writing a specific proposal to provide identified services to identified pupils. The contract must be approved by the state education agency (SEA) as meeting the federal purposes under

the act. State and federal auditors then hold the district accountable for fulfilling the contract. Districts may not accept Title I money and spend it on students or services not included in their contract, and they may not reduce their own educational efforts for the students participating in the federal program.

In sum, students are entitled to receive educational services by Title I, and the act provides funds for the purchase of the services. The services are usually—but not necessarily—purchased from local public school districts. But the act specifically includes non-public school children every step of the way. They are counted in determining the proportion of low-income children living in the area and therefore in determining Title I allocation to each area. Under the act, children are entitled to receive Title I funds irrespective of the school system they come from. Attendance at any form of non-public school should not bias a student's chances of receiving the Title I services to which he is entitled.

An accurate statement of the law would be: Non-public school students should have the same opportunity to receive Title I services they would enjoy if they were attending public schools. And the intensity and quality of the services they receive should be equivalently proportionate to their needs.

This account—which includes findings on the failure of private school children to get their rightful share of Title I funds—will be regarded by me as authoritative with respect to how the law and related regulations are being implemented.⁶

I have, in an earlier memorandum, put thus the problem of judicial review of Title I programs under the Elementary and Secondary Education Act:⁷

What, then, should we expect from the Court if it should review the Title I programs? May the magnitude of the expenditures themselves make it appear that the American taxpayer has inadvertently stumbled into the business of heavily subsidizing the educational activities of church-related schools? Or will the specialization of these expenditures, directed as they are to poverty-related deficiencies, be seen as essentially a public-health-like service, if not even as a kind of affirmative action effort (insofar as poverty is related to racial discrimination)?

The extent to which the billions of dollars of Title I expenditures have been perceived to have been directed to "poverty-related deficiencies" is indicated in accounts by Chicago newspapers, in December 1977, of alleged misappropriations of Title I funds. The headlines are suggestive: "Millions in school aid for the poor wasted"; "School superintendent/ orders probe of aid for poor";

"Federal school funds for poor paid to phony catering service"; "School funds for poor used for class reunion"; "Probe school funding for poor, legislature urged."8

Excerpts from the first of these accounts reinforce the impression conveyed by these headlines and report in some detail how the programs are administered:

Thousands of children attending school in Chicago's poor neighborhoods have been shortchanged by the Board of Education because of waste and mispending of millions of dollars in a federally funded program intended to help those youngsters break the cycle of poverty.

The program is supposed to provide special instruction to children from low-income families to help them raise their reading and math skills. . . .

Chicago is spending only 65 per cent of its federal grant directly on instruction. In New York, 93 per cent of the federal dollar goes directly for instruction. In Los Angeles, the figure is 87 per cent. . . .

Chicago schools get about \$50 million annually under this special federal aid-to-education program. It's called Title I because the funds are appropriated under Title I of the Elementary and Secondary Education Act of 1965.

Begun as part of President Lyndon B. Johnson's war on poverty program, the idea behind Title I was to concentrate some special--sometimes innovative--programs on children whose economic, social or cultural background might otherwise doom them to a cycle of ignorance and poverty.

Last year, nearly \$2 billion in federal funds were spent nationwide on programs intended to give children from low-income families a better chance to learn reading and math skills.

Nearly 240,000 students in Chicago schools are eligible to receive the special instruction, but the Title I program this year is serving only 61,497 of them.

"The federal grant is never large enough to serve all eligible children," said . . . the assistant state school superintendent responsible for all Title I programs in Illinois. "Some children will be left out."

But the Task Force learned that if administrative costs of Chicago's special instruction program were brought into line with other cities, an additional 16,000 pupils in 44 eligible elementary schools could be served. . . .

The parents of children attending DuBois Elementary School, know only too well the benefits of the extra reading and math classes--and the ill effects that resulted when the Title I program was stopped.

For three years, the school, in a low-income area on the city's far South Side, received an extra \$100,000 a year to provide extra instruction.

But Title I administrators this year decided the need at DuBois was not as great compared with other schools and the program was canceled there.

While Title I administrators budgeted \$320,000 this year for public information services, the parents at DuBois are trying to make up for the loss of their federal funds through bake sales and candy drives.

The Task Force found that many other cities spend 80 to 90 per cent of their Title I dollars directly for instruction--salaries of teachers and teacher aides, special learning material and audiovisual equipment, books and learning games.

Most cities, including Chicago, spend part of their federal grant to pay the salaries and expenses of counsellors, psychologists, doctors, and nurses, and pay transportation costs of pupils and parents--all considered supportive to the educational program.

However, the Task Force determined, 27 per cent of Chicago's federal grant goes to pay the salaries and expenses of administrators, staff assistants, a research and evaluation staff, janitors, and other costs of operating the program, which have no direct educational benefit to children from low-income families.

Responsibility for the federal program lies with the Division of Compensatory Education in the Office of Education under the U.S. Department of Health, Education, and Welfare.

Both state and federal education officials are supposed to monitor local programs to see that the special instruction funds are spent properly.

The newspaper stories do indicate how Title I programs can look to the general public: they are for the benefit of poor children, whatever school they may be in; they are welfare programs (in the best sense of "welfare").

It is evident that eligibility for participation in the programs is not determined by the school (or by the kind of school) the children attend but rather by the district they live in. The emphasis is upon economic circumstances which are believed to affect educational progress and which call for the remedial services provided under these programs. Thus, the programs come to

public view as welfare efforts, something quite proper for administration under Federal auspices.⁹

The constitutional propriety of Title I programs for students in church-sponsored schools is argued, from the perspective of counsel friendly to the Title I legislation, in the excerpts set forth in Appendix I, below, from the January 1974 Brief for the United States in a case brought to the Supreme Court from the State of Missouri. That brief (in a case which was not decided by the Court on its merits) is useful for an informed analysis which accepts as authoritative the Court's rulings and doctrines in the Religion Clauses cases. That analysis has been brought up-to-date, so to speak, by my October 1977 analysis of a recent case and its implications for Title I programs, which analysis is set forth in Appendix II, below.

In the present (1978) memorandum I develop further my 1977 analysis, even as I call into question some of the Court's constitutional doctrines respecting these matters. It is well to emphasize at the outset of this memorandum, as of considerable importance in these matters, the need to make a full record in any litigation--so that judges may see what does go on in church-sponsored schools and to what effect. An extended judicial inquiry gives American common sense and the American sense of fairness an opportunity to exert their proper influence in constitutional interpretation.

Section 2. "First Amendment" limitations on public funding and church-sponsored schools

The distinctions I have drawn--with an emphasis upon Title I programs as welfare efforts for children presumably handicapped by their economic and social circumstances--take account of the state of constitutional law at this time with respect to any expenditure of public funds on behalf of children attending church-sponsored elementary and secondary schools.

This seems consistent with the law developed by the Supreme Court since the Everson bus fares case (in 1947).¹⁰

A Roman Catholic legal scholar has recently summed up that law for me in this manner:

I am sure that you are familiar with the six or seven major Supreme Court decisions on church-state relations and private schools. These decisions over the past generation make it overwhelmingly clear that no aid may go to church-related schools of less than collegiate rank. About the only aids that may be given are bus rides and secular textbooks.

Restrictions have been laid down, not only against direct provision of public funds to church-sponsored schools but also against various (but not all) indirect provisions. The Court has insisted it will strike down all efforts to evade its restrictions. Thus, the Court invalidated (in Nyquist, 1973) New York's three-part program for financial aid to private elementary and secondary education:¹¹

The scheme included (1) direct grants to nonpublic schools in low income areas for "maintenance and repair" of facilities; (2) tuition reimbursement grants for low income parents of children in nonpublic schools; and (3) income tax relief for middle income parents. The Court found flaws in all parts of this latest of "the ingenious plans for channeling state aid to sectarian schools that periodically reach" the Court.

Publicly-funded welfare services are permissible, no matter where the children may happen to be, provided that such services are available for all children (that is, provided they are not just for children in church-sponsored schools). Even Justice Marshall, one of the strictest of the separationists on the Court, is willing to allow genuine welfare services to be made available to children wherever they may be found. (See Appendix II, below.)

Wolman (1977) affirmed Lemon (1971) and Meek (1975) as to what has been permitted from Everson (1947) to Allen (1968) to be purchased with State funds for the sake of students attending church-sponsored schools: bus transportation, school lunches, public health services and certain secular textbooks.¹²

Diagnostic services for speech, hearing or psychological defects can also be provided by public employees on the sites of church-sponsored schools. Care must be taken, however, to provide on-site only those services which do not affect the sectarian aspects of the schools' activities. "Involvement with the day-to-day curriculum of the parochial school would be impermissible."¹³

Providing "therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible effect of advancing religion." But providing such services on the site of a church-sponsored school can be quite a different matter. Even diagnostic services delivered on-site have been met with this challenge, "Appellants assert that the funding of these services is constitutionally impermissible. They argue that the speech and hearing staff might engage in unrestricted conversation with the pupil and, on occasion, might fail to separate religious instruction from secular responsibilities." Although this challenge was turned back by the Court, it seems to be generally agreed among the authorities that the "intrusion of religious influence" must be guarded against.¹⁴

The public supply of secular textbooks, first approved by the Court in Allen (1968), continues to be questioned by some members of the Court. The following distinctions have been suggested:¹⁵

A critical issue in Allen was the "classification" to be given to the textbooks involved: Was the providing of textbooks to be seen as a secular service rendered to parochial school children? If so, the Everson model probably controlled the case. Or were textbooks to be seen as a part of the teaching process, and the providing of them to parochial schools as an aid to religious instruction? If so, any analogy to the Everson buses was inapposite.

The Court did say, in Allen, "The New York law merely makes available to all children the benefits of a general program to lend school books free of charge."¹⁶ But one eminent constitutional scholar has questioned in this fashion the Court's decision in Allen:¹⁷

Now buses and nurses and lunches are not ideological; they are atmospherically indifferent on the score of religion. Can the same be said of textbooks chosen by a parochial school for compulsory use, interpreted with the authority of teachers selected by that school, and employed in an atmosphere deliberately designed through sacred symbols to maintain a religiously reverent attitude?

Thus, any educational aid to church-sponsored elementary and secondary schools remains suspect. Lemon and Nyquist have made commentators wonder "whether Allen remains good law."¹⁸ It has been suggested that Chief Justice Burger intended in Lemon (1971) "to signal proponents of 'parochialism' that benefits channeled directly to children or parents would be treated more kindly than direct grants to schools; the Chief Justice failed, however, to convince a majority of the Justices that tuition grants or tax credits should be upheld under the 'child-benefit' theory."¹⁹ His failure can be seen in the invalidation in Nyquist (1973) of the New York program I have referred to.

Also invalidated has been public support for the salaries of teachers, even for teachers of secular subjects, in church-sponsored schools. In Levy (1973), the Court ruled that it did not matter whether the services supported by public funds had been "mandated" by the State: "State or local law might, for example, 'mandate' maximum lighting or sanitary facilities for all school buildings, but such commands would not authorize a State to provide support for those facilities in church-sponsored schools."²⁰

Even the public funding of bus rides, approved in Everson in 1947, has aroused opposition among some members of the Court. Justice Rutledge, dissenting in Everson, argued that if that which had been funded there could be justified as "public welfare legislation," "there could be no possible objection to more extensive support of religious education by New Jersey."²¹ Justice Douglas, one of the majority in Everson, later observed that Everson "seems in retrospect to be out of line with the First Amendment. Its result is appealing, as it allows aid to be given to needy children. Yet by the same

token, public funds could be used to satisfy other needs of children in parochial schools--lunches, books, and tuition being obvious examples."²²

To sum up: the Court may well approve publicly-funded welfare services which are made available to all children wherever they may be found. But services which consist of teaching, or come close to it, are suspect, especially if not provided at "truly religiously neutral locations."²³ There seems to be no problem now with diagnostic services, whether for health conditions or for educational achievements. But there are problems with remedial services ministering to educational deficiencies discovered as a result of diagnostic service. Must these be regarded as so much like teaching as to require that they too be offered only at "religiously neutral locations"? Services of this character are critical to the Title I programs.

The problem is an acute one, since it seems likely that Title I remedial programs are not likely to be provided as competently off-site as on-site. (If they were better off-site, would not public school children routinely be taken to such sites?) Interference with a school's curriculum, moral tone and discipline can be considerable if relocations are regularly required during the school day. In addition, much of the Title I allocation for the benefit of children in church-sponsored schools could go to transporting those children to "religiously neutral locations." One solution is for the public agency providing the service to "lease" from church-sponsored schools the space in which remedial programs are administered.²⁴ Does not the success of this arrangement depend upon how accommodating the judicial watchdogs are? How accommodating they can be induced to be may well depend both on how the Title I programs themselves are seen by them and on what First Amendment precedents are seen to be established by accommodation here.

It is the latter consideration--a concern about precedents--which seems to have been critical all along in the Establishment Clause cases. When someone's

free exercise of religion is impeded--for example, if it is impeded by the requirement that he participate in religious ceremonies in which he does not "believe"--, he is presumed to be immediately hurt. But in the Establishment Clause cases, it has been recognized that no immediate establishment, and hence harm, has been evident; rather, the emphasis by separationists has been on what may happen eventually if there is acquiescence in the early stages.

The immediate question here, therefore, is not the general constitutionality of Title I programs but rather how they are to be administered for the benefit of children in church-sponsored schools.²⁵ It might be useful, with a view to inducing accommodation, to notice the extent the "welfare" criteria in these matters can be carried. "Welfare" may not refer primarily to the kind of service provided but rather to whatever is required because of the economic and social circumstances of the children being served. If this approach is used, distinctions between the "welfare" and "educational" categories break down.

These suggestions are addressed, in part, to the distinction Justice Black endorsed in his Allen dissent (in 1968) between "streetcar fares for school children" and "funds to buy school books for a religious school." He did not want to see tax money used, "even to the extent of one penny," "to support religious schools, buy their buildings, pay their teachers, or pay any other of their maintenance expenses." But anything (including the subsidy of fares) which reduces the costs of parents sending children to a "religious school" is likely to make it easier for that school to survive. On the other hand, whatever any reputable school does can be assumed to be primarily for the benefit of the children enrolled there.²⁶

Who, then, is the true recipient of whatever services are provided? Who is the principal beneficiary, for example, of the publicly-funded field trips for children in church-sponsored schools ruled out in Wolman (in 1977)?²⁷

"It is much clearer now," one scholar had said in 1973, "than it was after Lemon /in 1971/ that public funds may not be used in any major amount to relieve the economic distress of church-related schools. It is also much clearer why they may not be." "What are now the limits of the permissible?" he asked. "What sorts of supportive arrangements between government and church schools may still pass muster? The marginal pupil benefits (bus transportation, hot lunches, textbooks and the like) are still acceptable. There seems little enthusiasm on the Court to reverse Everson or Allen."²⁸

It seems generally recognized that church-sponsored schools are threatened more and more by "economic distress." It also seems to be recognized, at least in some quarters, that large-scale Federal funding for public schools can make it ever more difficult for private schools (religious or otherwise) to survive. Would it not be prudent, then, to reconsider (before it is too late) Justice Black's distinction (in Allen) between what is done "for school children" and what is done "for a religious school"? I propose to develop in this memorandum the proposition that it is neither for the children nor for the schools, but rather for the general welfare, that Federal funding is used through Title I programs to rehabilitate certain kinds of students wherever they may happen to be found. To develop this proposition properly, I must consider what the First Amendment does and does not say.

Section 3. The dependence of private schools on public schools for Title I programs

The framers of the Elementary and Secondary Education Act of 1965 can be said to have agreed emphatically with one overriding concern expressed by Justice Black and his separatist colleagues in Allen and on other occasions. That is, the Act explicitly provides in its concluding section, "Nothing contained in this Act shall be construed to authorize the making of any payment under this Act . . . for religious worship or instruction."

That the Title I programs are dominated by "welfare" considerations (rather than by "religious worship or instruction" or even "education" considerations) is suggested by the fact that the preliminary criteria for a student's eligibility are economic and geographical: the child must live in a low-income area. The programs represent a concerted effort to compensate for the supposed adverse effects of the social and economic circumstances of a child's family on his academic performance and prospects.

Title I programs do try to conform to what the Court has said the past three decades about the Establishment of Religious Clause. One commentator observed (in 1973) that "the possibilities of substantial public support to church-related schools now appear truly remote."²⁹ Another commentator, a vigilant separationist, suggested (in 1974) how "shared-time" or "dual enrollment" arrangements might be legitimately used to avoid the constitutional pitfalls left by the 1973 cases. His suggestions point up the suspicions aroused among some of us whenever church-sponsored schools and governments become "involved" with one another.³⁰

For a shared-time or dual enrollment program to avoid "excessive entanglement," it would seem that the children in question from the religious schools would have to be treated no differently than any other children in the public school, nor could any preference be accorded the religious school authorities in making the requisite arrangements. Among other things this would mean that the "dual enrollment" children would have to be under the exclusive jurisdiction of public school authorities while on public school premises, that they must be freely intermingled with the regular school pupils in all activities in which they participate, that all instruction must be given solely by public school personnel on public school premises and that there must be no interference by religious authorities with the administrative decisions normally made by public school authorities with reference to study materials, curricula, homework or other matters. In sum, for a "dual enrollment" program to be upheld it would seem that it would have to be implemented in such a fashion that it does not become a de facto church/state merger or partnership in which government is materially aiding religion.

Such are the kinds of considerations which have affected either the design or the implementation of Title I programs.³¹ Of course, there may be

something artificial (and hence inefficient) in funneling Federal aid for private school students through the public schools. Is it not like having General Motors funded by the government to service Chrysler automobiles? All this is complicated by the fact that the total amount of Title I money is fixed at any particular time. If more is allocated by public school administrators to private school children in their districts, there will be less available for their own public schools.

Eligibility varies from district to district; and, perhaps even more of a problem, private schools are bound by the public schools' eligibility. The target area definition is keyed to the public school: unless the public school is eligible, the private school is not. There are both quantitative and qualitative limits on what private schools can receive: they can get, under Title I, no more (and no better) than what public schools get. Usually, of course, private school students do not get as much or as good service as their public school counterparts.³²

The limits placed by the Court upon what can be done to help children in church-sponsored schools has led, in effect, to severe limitations on what will be done in the decades immediately ahead with the massive Federal funds available for allocation to elementary and secondary education. Roman Catholics have indicated they must share to some extent in those funds—or else there will be nothing substantial for anyone provided by Congress.

Section 4. Race and "religion" in the inner-city church-sponsored schools eligible for Title I programs

Further indications of the "welfare" aspects of the Title I programs should be noticed. The programs may only mean, so far as Establishment of Religion concerns are involved, that Roman Catholics are being encouraged to continue to provide schools for non-Catholics in the inner cities.³³

These schools often have no parish to support them; they must be subsidized by diocesan authorities or by others in the Church. Public funds may sometimes reduce what the Church must spend on these schools—but it is far from clear how much, if any, relief Title I services do provide. Without substantial public support in the years immediately ahead, many of these schools will close, thereby relieving middle-class Roman Catholics of significant welfare contributions they are, in effect, making to poor Southern Baptists.

Consider Providence-St. Mel High School in Chicago. Its circumstance suggest what has been happening to Roman Catholic schools in our inner cities. This is one of two private high schools on the West Side of Chicago.³⁴ It has been described to me by one of its faculty as having (in the 1976-1978 period) 342 students. None of its students is white; almost all of them are from the inner-city neighborhood of the school. Of these students, only 40% are Roman Catholics. One hears of even smaller proportions of Roman Catholics in some of the parochial elementary schools in the inner city of Chicago. The only serious alternatives for such students are inferior public schools.

Of Providence-St. Mel's 31 faculty members, 50% are Roman Catholic; 35% are white. Except for one nun, everyone on the faculty is a lay person. The principal is not a Catholic.

The annual budget of Providence-St. Mel is modest, \$400,000 (or about \$1,170 per student, less than half the public high school expenditures, I am told). Tuition accounts for \$189,000, or almost half of the school's income (student tuition is \$440 a year per student). The Archdiocese provides \$150,000, or almost 40%, through its high school subsidy program. The remaining income of the school must come from fund-raising efforts by parents (80% from bingo; some from a fashion show). The only Federal or State aid available to the school consists of money for library books (under a Federal program)

and Federal money received by the Archdiocese to run a hot lunch program (in which the school participates).

There seems to be only one formal religion course offered at the school, and this is by the one religion teacher, who teaches four periods a day (with a maximum of only 120 students in all such classes). Proselytizing, it also seems, is minimal, perhaps even non-existent. It is hardly religion that this "Catholic" high school offers or advances but, at most, the discipline (such as it may be) made possible in part because of the dedication (religious or otherwise) of various of its administrators, teachers, families and supporters.

This is, of course, only one church-sponsored school. But I have been assured that the circumstances of this school are not unusual in our inner cities; indeed, some say they are typical. Perhaps "a question of fact" should present itself to the constitutional scholar who is concerned about public support of church-sponsored schools: what is really going on in urban church-sponsored schools, especially in those enrolling substantial numbers of students eligible for Title I services?

These schools, it should be remembered, are often eligible for Title I services because of the poverty of their minority students, many of whom are not of the faith of the church sponsoring the schools. Indeed, one must wonder what religious training is being given even in the more prosperous urban or in the suburban Roman Catholic parochial school? Separationists are fearful lest public funds be used for the support of religion. But cannot public funds be used to support discipline, education and morality, however they are advanced?³⁵

It is far from clear, by the way, why Roman Catholics continue to operate inner-city schools which are often run primarily for the benefit of the non-Catholic poor. Altruistic motives should not be discounted. It sometimes seems, in fact, that those who run church-sponsored schools in the inner cities are much more concerned with promoting good race relations than with promoting any particular religion.

But should it matter to the public at large what Roman Catholic motives (or hopes or fears) are, so long as a clear community benefit follows from what they do? Certainly, it should not surprise us that there should be, every fall, a crisis in the inner cities as to which Roman Catholic elementary and secondary schools are going to close because of the "natural" lack of support from Roman Catholics whose children are not enrolled in those schools.³⁶

All this should point up the considerable welfare thrust of the church-sponsored schools eligible for Title I services. Should not the public be realistic about what is (and is not) happening in these schools? Of course, some would reply, the public should be realistic also about the dangerous precedents which might be set if public aid should be extended to church-sponsored schools in special circumstances. Comprehensive public funding of church-sponsored schools is seen as the ultimate threat to the American way of life.³⁷

But should nervousness about a quite uncertain long run be permitted to obscure what is happening right before our eyes?³⁸

Section 5. The distorting effects of current "constitutional" doctrines on education policy

One thing that is happening right before our eyes is a considerable distortion of educational policy because of supposed constitutional doctrines. Is there not something unsettling—however egalitarian in appearance—in having a concern keyed to "low-income families" provide the means by which the Federal Government first gets into elementary and secondary education on a large scale? Aid to Education thereby takes on the character of Aid to Dependent Children. Is the interest of the community in mere education thereby lost sight of?³⁹

Also unsettling is the channeling of almost all Federal aid through the public schools. Consider the effect in private (and especially church-sponsored

schools of counsellors supplied by the public schools. Are not those counsellors apt to promulgate more permissive standards, not with respect to religious doctrines (which are hardly the concern of the day) but with respect to birth control measures, dress codes and even homework? In addition, public schools tend to promote different attitudes from those ^{that} private schools do about the part to be played by families in child-rearing and in education-- and that part may be decisive for the rescue of the very students that Title I programs are most concerned with. In short, who supervises the Title I public school personnel who work with private school students? Indeed, is there apt to be any effective supervision at all?

The unsettling effects of Title I programs, as now organized, can be felt even by schools not participating in them. Certain services, such as remedial reading, counselling and guidance, come to be generally stressed in the teaching profession because of the impetus given them by heavily-funded programs and their administrators. And, of course, the effect of Title I money on public school teachers' salaries in a city can make it even more difficult than it already is for private schools to compete for teachers.

In any event, the Title I approach is not necessarily the way we would use massive Federal educational funds if we could do what we thought best. The poor as such, rather than general educational needs, would perhaps not be ministered to as much. Certainly, it is odd to stress rehabilitation so much more than proper shaping in the first place. Such shaping could well mean more concern with the upgrading of all education. As matters now stand, however, the problems faced by the unfortunate and the lowest tend to set the terms and determine the methods for the improvement of all.

Funnelling all money through public schools certainly does not seem the most efficient way of proceeding. Nor does centralization encourage diversity of offerings. But constitutional doctrines (both Federal and State) have led

to more and more educational centralization in this country. The required contacts between private and public school administrators have had mixed results. They have become more comfortable with one another: after all, they are very much alike--in background, training, interests and often even in religion. On the other hand, it remains to be seen, as Title I programs mature, whether the public school people in charge of them will become more assertive. One critical divergence in interests should be remembered: the less service there is forwarded to private school children, the more there is left for public school children.

The distortions induced by constitutional doctrines may perhaps best be seen, in the years immediately ahead, in the concern already mentioned whether Title I services should be provided on-site or off-site for students in church-sponsored schools. There is not much question at this time that these students will get Title I services somewhere; but there is considerable question whether the services will continue to be made available at least as efficiently as they have been during the past decade.⁴⁰

What has been said thus far about the public school source of programs, about the limits placed on innovation and experimentation (including experimentation with old-fashioned educational methods), and about the effects of outside supervision should suggest that the integrity of private schools is very much affected as they adjust themselves, in pursuit of Title I and other services, to public schools and their ways. Should not involvement of public school administrators in private schools be kept to a minimum if we are to have private schools flourish and adapt sensibly to their own circumstances?

State constitutional restrictions have sometimes kept Congress from simply allocating funds to the States for them to use to provide services to church-sponsored schools in their respective jurisdictions. On the other hand, the doctrines developed by Federal courts have kept Congress from allocating funds

directly to those schools. This state of affairs contributes to the argument for a comprehensive voucher system for education in this country. The merits of such a system continue to be debated--but the constitutional doctrines which prevent a significant minority of our schools from sharing in public funds, and which in turn induce that minority to use its considerable political power to keep those funds from the public schools as well, provide added support for recourse to vouchers.⁴¹

Here, too, a non-educational element may play too large a part in what should be an educational decision. The consequences of this development are varied and unpredictable. Should it not suffice to say, in the context of this memorandum, that if vouchers may be constitutionally used to finance all education, then why should we not permit direct payments to the church-sponsored schools already chosen by parents? Would not this have a less disruptive effect on established educational institutions, even as it promotes some experimentation and freedom of choice?⁴² Or, put another way, what is the least disruptive manner, in our circumstances, of spending educational funds? Is it not by remaining free to support and use established institutions?⁴³

A recognition of the distorting effects of current constitutional doctrines should at least lead us to a more sympathetic view both of a "welfare" rationale for Title I expenditures and of the case for on-site provision of Title I services to children in church-sponsored schools. It should be remembered that religious practice is, in large part--and this is especially true with respect to current differences among our major sects--, a matter of forms. Should not an effort be made wherever possible to allow plausible forms (such as sensible leasing arrangements) to be used to quiet constitutional concerns?

Section 6. Is aid to a church-sponsored school really aid to the "religious mission" of a church?

A salutary reassessment of current constitutional doctrines should raise the question whether aid to the educational activities of a church-sponsored

school should be considered, for constitutional purposes, aid also to the religious mission of the church sponsoring the school. It may well be, that is, that no constitutional issue should ever have been reached in the school aid cases.⁴⁴

Various devices have been resorted to in an effort to get public funds or support supplied to church-sponsored schools:⁴⁵

"Dual-enrollment," "leasing," and "shared time" programs are relatively modern devices by which financially pressed religious schools attempt to obtain a measure of state aid. These programs are premised on the assumption that a constitutionally significant distinction can be drawn between a parochial school student's secular and religious education. Under one model, a parochial school student attends a regular public school for secular studies and returns to the parochial school for religious training. At the other extreme, the so-called direct subsidy model, the student never leaves the parochial school, but the state "leases" the facilities and employees for hours in which secular studies are taught and reimburses the parochial school for providing "public school" students with secular services.

No doubt, this is the sort of thing that Justice Black warned against in his Allen dissent (in 1968) when he anticipated "a variety of schemes the Court would find itself approving if it took what he regarded as the fatal first step of approving the New York textbook law."⁴⁶ Or, as Justice Douglas complained in Lemon (in 1971), "And so we have gradually edged into a situation where vast amounts of public funds are supplied each year to sectarian schools."⁴⁷

Even so, does not the public have a legitimate interest in supporting institutions where morality and discipline, to say nothing of education, are advanced?⁴⁸ Is not the shaping of moral character a critical need for and duty of the community? Should not public funds be as available for that as they are for, say, hot lunches?⁴⁹ Are there not moral habits encouraged in church-sponsored schools which the public could support without having to believe that the primary purpose of such support is to "establish" some religion?⁵⁰

Everyone agrees that there must be an adequate secular legislative purpose in any distribution of public funds to private schools.⁵¹ Thus, it was held in Cochrane (in 1930) that the provision (by loan) of textbooks to pupils of both public and private schools was not a taking of private property for non-public use.⁵² Is not also the encouragement of morality in itself a legitimate public interest, which contributes as well to a respect for, and otherwise advances, education?⁵³

When one turns from the intentions and purposes of the public bodies providing funds for church-sponsored schools to the primary and probable effects of such provision, one must wonder about the oft-voiced concern that there not be sanctioned among us any "establishment of religion." It has been recognized that any aid—including for bus rides and textbooks—may help a church-sponsored school stay open, thereby giving church authorities access to and control of children at an impressionable age.⁵⁴ But does it not depend on circumstances just what such education does to the religious faith of students? Besides, is this a legitimate concern of the community?

It used to be said that Roman Catholics insist that every subject taught in parochial schools should be permeated with Christian piety.⁵⁵ But what are the long-run consequences of even that? Is anything being established thereby but certain attitudes with respect to discipline? Such students often seem indistinguishable, to the eye of the citizen, from those trained properly in other schools.⁵⁶ Certainly, it cannot be denied that the parochial schools in this country have consistently turned out dedicated citizens and moral human beings fitted to live in the modern world. Should not that be the limit of government's non-educational interest in what happens in those schools? Is not this a healthier approach to these matters than that

which insists that public funds can be expended only in support of "religiously neutral" schools?

Besides, can any school be completely neutral with respect to religion (that is, with respect to the premises and standards upon which religion depends)? What is taught, the way it is taught, what is implied about good and evil and about the eventual as well as the immediate consequences of one's conduct—all these things can very much affect the religious susceptibility and interests of students. It must be virtually impossible to have a school system (or an economic system or, indeed, a political system) which does not favor certain "religious" inclinations and discourage others.⁵⁷

Why, then, should not public support of church-sponsored schools be treated the way public support of church-sponsored hospitals and children's homes has long been? The first Supreme Court decision on the Establishment Clause sustained (in 1899) a Federal appropriation for construction of a public ward to be administered as part of a hospital under the control of a Roman Catholic order.⁵⁸ Such public reliance upon, and financial support of, church-sponsored facilities and services had been considered routine long before the cases of church-sponsored schools began to be litigated.

Justice Douglas, in his concurring opinion in the Engel school prayer case (1962), listed various ways in which government "aids" religion in this country:⁵⁹

. . . N.Y.A. and W.P.A. funds were available to parochial schools during the depression. Veterans receiving money under the 'G.I.' Bill of 1944 could attend denominational schools to which payments were made directly by the government. During World War II, federal money was contributed to denominational schools for the training of nurses. The benefits of the National School Lunch Act are available to students in private as well as public schools. The Hospital Survey and Construction Act of 1946 specifically made money available to non-public hospitals.

Such public support has not been considered, primarily, aid to religion, even though (as pointed out by Justice Black in Everson) State court decisions

"show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion."⁶⁰

It is said, however, that institutions such as hospitals are entitled to public aid if they are open to all. Besides, it is also said, hospitals do not indulge "in religious instruction or guidance or indoctrination."⁶¹ But cannot people be much more deeply moved by medical services, and by care for their self-preservation or in their dying, than by education?⁶² But no matter: are we not also accustomed to arrangements whereby contributions made to a church to support not only its schools but also its explicitly religious services and mission are tax-exempt? Thus, "public funds" have long been used, in effect, to support religious institutions--without having "established" any religion among us.

Is it not obvious that the public benefits from such institutions? The private school system, which is for the most part church-sponsored, is said to relieve American taxpayers of about nine billion dollars a year in expenditures.⁶³ The Court has recognized that "private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience . . ."⁶⁴ It has also recognized that some States have responded to financial crises in church-sponsored schools because of the steady rise in costs.⁶⁵

Decisive to the attitude of the Court with respect to making public funds available for any church-sponsored schools is the opinion that various Justices have had about the role parochial schools play for the Roman Catholic Church. Particularly striking is what Justice Jackson said in his Everson dissent (in 1947):

I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital, part of the Roman Catholic

Church. If put to the choice, that venerable institution, I should expect, would forego its whole service for mature persons before it would give up education of the young, and it would be a wise choice. Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests; and to render tax aid to its Church school is indistinguishable from rendering the same aid to the Church itself.⁶⁶

Other members of the Court ^{have} developed similar sentiments since the 1947 Everson bus case. Justice Douglas has argued that a church institution "is an inseparable whole, a living organism, which is strengthened in proselytizing when it is strengthened in any department by contributions from other than its own members."⁶⁷ Justice Stewart has made the following judgment (drawing upon an opinion by Justice Brennan):⁶⁸

The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. . . . Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. "The secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined."

Thus, the loan of materials and equipment to church-sponsored schools was ruled out in Meek (in 1975) because it contributed to a "direct" and substantial advancement of religious activity."⁶⁹ Thus, also, it has been said that "the raison d'être of parochial schools is the propagation of a religious faith";⁷⁰ the church-sponsored school "is an organism living on one budget."⁷¹

What are Roman Catholics getting from their school system? Is it worth the considerable resources they devote to it? What has been the basis of the expansion in recent decades of other churches (which do not support school systems)? Are non-Catholics realistic about what is to be feared from the Roman Catholic system? Is it a legitimate concern of the community what Roman Catholics believe they are getting?

I submit that it should not matter to us, for constitutional purposes, what a church believes or wants with respect to its "religious mission." Its perceptions, interests and expectations should be irrelevant to how the public should respond to the rather obvious activities of that church. We can be reminded here of Communist Party prosecutions a generation ago. It was necessary in those cases, as Justices Black, Douglas and Brennan and Chief Justice Warren so often reminded us in their gallant dissents, to separate conduct from speech and to treat them differently.⁷² Does not the same necessity exist in the Establishment of Religion and the Free Exercise of Religion cases?

Government can properly penalize such conduct as bigamy and child neglect,⁷³ whatever the sincere religious opinions may have been which led to (or even "compelled") the misconduct (and even though the opinions themselves, as such that is, without the conduct/ need not be vulnerable before the law).⁷⁴ Why then cannot the public provide aid to church-sponsored school children, and even to the schools themselves, so long as legitimate public concerns are being dealt with (concerns about transportation safety, nutrition, morality, health, and education) and so long as the aid is not primarily designed by the public to advance or to hinder the "religious mission" of the association sponsoring the schools?

Communist Party members no doubt have often had delusions of impending grandeur. But it should have been evident in the 1950s that their threat to the government of the United States, as members of the Communist Party, was trivial.⁷⁵ The same can be said about many, probably most, would-be monopolists in our market place. Should not the same healthy skepticism be applied to the "threats" anticipated by some from the Roman Catholic Church in this country or from public support of church-sponsored schools?

Until there is a fundamental change of attitude among ^{suspicious} intellectuals who presume to speak for the public, however, the obvious constitutional points I have been suggesting in this memorandum about the significance of public support of church-sponsored schools (and about the "religious mission" of churches) are not likely to be readily accepted. It was this suspicious attitude, prevailing in his day, which induced a politic Roman Catholic President to say (in 1961), "The Constitution clearly prohibits aid to . . . parochial schools. I don't think there is any doubt of that."⁷⁶

Section 7. How do we want our children educated, wherever they may be found?

It should be evident from what I have said that Title I programs should be regarded as substantially complying with the "establishment of religion" criteria heretofore employed by the Court.⁷⁷

It should be evident as well, from what follows, that I regard as rather questionable many of the constitutional criteria which have been developed by the Court (and to which legislators have again and again conscientiously tried to conform).⁷⁸

Central to the problem of public funding of church-sponsored schools is not a constitutional issue but a policy question. We should be asking ourselves, Do we want what we are getting from these schools?

The legitimate constitutional issue which does come up here, in the circumstances of the United States today, is not that of any possible establishment of religion but rather that of any possible interferences by government with the free exercise of religion. A free exercise problem is evident when public oaths, school prayers, and religious ceremonies are mandated by law. Thus, the Gobitis-Engel cases should raise more serious constitutional (or at least political) concerns than the Everson-Allen cases.⁷⁹ One can see in the

Gobitis-Engel line of cases the spectacle of governmental power being used to force reluctant children to act either "religious" or "patriotic" (or both). On the other hand, the Everson-Allen line of cases can be seen, I have argued, primarily as efforts by the public to secure educational services provided by church-sponsored schools.

It is the coercion of individuals which proves troublesome in the Gobitis-Engel line of cases, thereby raising Free Exercise of Religion concerns.⁸⁰ Certainly, Americans generally agree that people should not be compelled to witness, or even to seem to witness, to what they do not believe in with respect to religious matters.⁸¹

Thus, a genuine concern for religious liberty can be said to be shared in this country by all the major sects. No wonder then that religious liberty was "the American issue at the /Vatican/ Council . . ."82 It was the American bishops who argued for the right of conscience in the exercise of religion in society. Compare the sincere query a generation before, by a critic of the Roman Catholic Church, as to "whether the /parochial school/ system is producing Catholics first and Americans second . . ."83

It is not inconceivable, of course, that the size and influence of church-sponsored schools (or, for that matter, of public schools dominated by one or another sect) could in some circumstances undermine religious liberty or perhaps even threaten an establishment of religion in this country. But such developments can be dealt with politically (and perhaps also as a constitutional issue) when, if ever, they appear or threaten to appear decades from now. Until that prospect appears, however, no harm need be done--and considerable good can be accomplished--by our church-sponsored schools.⁸⁴

The problem of religious liberty can emerge in still another form which bears on our inquiry here. Should not our State and Federal Governments be

able, if they choose, to purchase from or support in church-sponsoring private schools what they can purchase from or support in nondenominational private schools? Otherwise, church-sponsored schools would be penalized merely for being connected with churches, and for no other reason. Such obligatory discrimination, it seems to me, could well raise questions regarding the free exercise of religion.

In addition, it should be said of the free exercise of religion concerns, just as it has been said above of establishment of religion concerns, that children (in whatever schools they may be found) can properly be taught the difference between right and wrong.⁸⁵ It is an artificial, and ultimately disastrous, view of education which rules out the moral component of children's upbringing, especially when what happens and is expected from them in school is so influential for the shaping of the young today. Neither of the Religion Clauses of the First Amendment should keep the public from supporting moral instruction and habituation either in public or in private schools.

The critical policy question ^{to} which I have several times referred--Do we want what we are getting from church-sponsored schools?--depends on several questions of fact and on an even deeper policy question. The relevant questions of fact include the following: What are we getting from the church-sponsored schools among us? Has not a major beneficiary, for a century now, of the parochial schools supported by Roman Catholics at great cost to them, been the American public? What has been produced by that system? What can be expected of it in the future? The deeper policy question is, How do we want our children educated, wherever they may be found? This question can and should lead to deliberate decisions about what we want in the way of a public school system, about the number and size of private school systems we want, and about what goes on in and results from all the schools we the public are (directly or indirectly) responsible for.⁸⁶

Such deliberateness can lead to support of educational activities, wherever they may be found—so long as students are learning and becoming what we want. It is a curious state of affairs when some private schools are willing and able to provide what the public wants but cannot always get from its public schools—and a willing public cannot find a way to pay for what it now gets and will stop getting as private schools close for lack of funds.⁸⁷ Why should it matter to the public what the supplier of publicly-desired educational services does with the money it is paid (so long as what it does is not in itself criminal or otherwise against public policy)?

Thus, the Country (or particular States therein) should be able to decide what school systems are wanted. If we want diversity, we should be able to have it and to promote (and support) it; if we do not want diversity, but rather a unified "religiously neutral" public school system, we should be able to try to have that also. Whatever the public chooses and pursues should be chosen and pursued in accordance with the rule of law and other constitutional standards. If we should decide to promote diversity, we should also be able to decide how much supervision we want to have of the schools which are not fully public.⁸⁸ In short, all schools are to some extent public; none is fully private. Certainly we should be able to say, if we choose, "We are glad to have people devoted to community concerns, even though the organization through which those concerns are expressed by them is a church, a synagogue or a mosque. We do not want to make it difficult for them to help us do our job."

Equal protection problems no doubt await us, if we should approach matters in this manner. But it is no denial of equal protection to recognize that some schools are better at certain things than others.⁸⁹ Nor should it raise an equal protection problem if we should choose to encourage only those schools which do what we want done. Nor should it raise an equal protection

problem if some sects choose to have schools (which are supported at least in part by public funds) and some do not--so long as all are free to choose to have such schools.⁹⁰ Nor should it raise an equal protection problem if we should decide not to support, in whole or in part, any private schools (even if this should mean, in practice, that poor children could afford to attend only the local public school).⁹¹ That is, I believe that neither the Free Exercise of Religion guarantee nor the Equal Protection guarantee should be used as leverage to move the public to permit or support private schools if it should deliberately choose not to do so.

It should be evident from what I have just said that I consider dubious the landmark case in this field, Pierce v. Society of Sisters.⁹² That 1925 Oregon school case stands for, among other things, the fundamental rights of parents to control the education of their children. I suspect that those rights rest ultimately upon the right to emigrate. I also suspect that respect for such rights has contributed to the child-benefit theory seen in the Everson-Allen line of cases. But whatever status the right to emigrate may have, it does not necessarily require parental rights in this form for those who choose not to emigrate.⁹³ It should also be evident that I have been arguing throughout this memorandum not for a child-benefit theory but for a community-benefit theory by which we should be governed in determining what schools we should have and how they should be supported.⁹⁴

Much is made by the Court, in justifying its Establishment of Religion decisions, of its desire to moderate among us political turmoil rooted in religious divisiveness. It even sees that desire to be critical to the purpose of the First Amendment. Thus, Justice Brennan warned, in his Wolman dissent, that "a divisive political potential of unusual magnitude inheres/d/ in the Ohio program" under consideration.⁹⁵ No doubt, this kind of question can be

divisive. But perhaps even more divisive has been what the Court has done in the interest of avoiding what it considers divisive. In any event, is it up to the Court to decide for us how much divisiveness or diversity we should have? Rather, should we not be free to discuss fully "matters of religion or public interest"?⁹⁶ Certainly, divisiveness is not unconstitutional.

It is a legitimate policy question whether we should provide any public support for private schools, a question which can be influenced by our judgment whether it would be unduly divisive to pursue the matter in the legislature. Similar concerns are heard from time to time about other political issues—but this does not mean that we ^{should} tolerate judges, in the name of reducing divisiveness, foreclosing legislative discussion and actions with respect to such matters. After all, the Speech and Press Clauses of the First Amendment are at least as important as the Religion Clauses.

Section 8. How should the cases purporting to interpret the Religious Clauses of the First Amendment be read?

Be all this as it may, ^{it} is evident that the Court will examine carefully any attempts to get around the constitutional doctrines it has laid down as Establishment of Religion prohibitions on public support of church-sponsored schools. But those doctrines, I have suggested (and will develop further below), are rather artificial. We are of course obliged to respect them, and to conform to them in practice, even as we attempt to return the discussion to fundamental issues.

Instructive for that discussion should be the realization that there is something curious about our official judicial policy regarding church-sponsored schools. That is, we consider families to have an unalienable right to make a free choice of schools for their children—even as we make it likely that the

quality of many of those schools will deteriorate. Should not the public either (1) help finance those schools, so that they will remain adequate, or (2) so supervise them that they will (a) remain adequate or (b) close down?

We now "compromise": we neither insist that they be adequately financed nor supervise them properly, to the detriment of both the children and the community.⁹⁷

I have suggested, thus far, what would be sensible and just in these matters. Something more should be said about current constitutional doctrines, however, if only to lend support to those who would argue on behalf of what is sensible and just by showing the limitations of these troublesome doctrines. Indeed, the pronouncements of the Court on the Establishment Clause, (particularly since the Second World War, can give constitutional law a bad name, perhaps even more so than the lamentable pronouncements of the Court on the Smith Act prosecutions a generation ago.⁹⁸

Something more needs to be said, that is, about the original meaning of the First Amendment, about the meaning of "establishment of religion," and even about the application against the States by the Fourteenth Amendment of the First Amendment guarantees. But, first, I should say something more about the cases which purport to interpret the Religion Clauses of the First Amendment.

I have already touched upon Pierce, the 1925 case which is said to have established the fundamental parental right to control a child's education. Although this case was not originally grounded in the Religion Clauses of the First Amendment, but rather in the Fourteenth Amendment alone, it now seems to have "become accepted that the decision in Pierce . . . was ultimately based upon the recognition of the validity of the free exercise claim involved in that situation."⁹⁹ Pierce has come to have far-reaching implications. Not only has it established "the right /of parents/ to choose nonpublic over public

education," but it has been used to help establish once unsuspected constitutional rights, such as the right of privacy, to contraceptives, and to an abortion.¹⁰⁰

I have anticipated my reservations about Pierce. The community, at least so long as it is not tyrannical, should have ultimate control over which agencies (public or "private") educate its children. Since the State, in any event, shares responsibility for church-sponsored schools, it should be able to support them to the extent that it chooses. Thus, Reynolds, the 1878 Mormon bigamy case, recognizes the primacy of civil authority in certain matters.¹⁰¹ Although Reynolds considered primarily the Free Exercise Clause, in effect, it does bear on the Establishment problem as well: it reminds us that official emphasis should be, in these matters, on the deeds, not on the opinions or beliefs of the parties under consideration. This could mean, among other things, that what is critical in assessing public financial support for church-sponsored schools is not the set of opinions teachers happen to have but whether that secular education is being provided which the State has mandated for its children (however mixed with, but not undermined by, religious or other teachings and practices that education may be).

Something more can usefully be said here about the two lines of development in the Religion Clauses cases I have suggested. One began (in the Twentieth Century phase) in a somewhat confused way (as in Gobitis) but settled down into a fairly clear line (as in Barnette, McCullum, and Engel). The other line seemed to begin in a clear fashion (with Justice Black's emphatic language in Everson), but has been rather confused ever since. The former line deals with situations which invite individual resistance, in that it deals with governmental situations which depend, or seem to depend, upon compulsion. Not that there has not been

considerable support in public opinion for such compulsion, but resistance to it does draw upon something deep and even noble in the American character.¹⁰²

Everson was an attempt, even as it allowed a certain kind of aid to children in church-sponsored schools (in the form of bus rides), to discourage other kinds of aid. What Justice Black was saying in Everson was perhaps not clear until long afterwards, perhaps not until Allen and Lemon. Thus, Everson can be said to have represented a good faith effort by him to ^{permit} whatever could be regarded by him as aid to children rather than as aid to the church-sponsored institution itself. This exercise in permissiveness thereafter permitted him to be rather rigid. And his subsequent rigidity could draw on the "absolutist" credo which he had first expressed in Everson.¹⁰³

The cases which have followed upon Everson, however, have all too often appeared arbitrary, making prediction difficult. No doubt, most Americans would agree with Chief Justice Burger's insistence, in the Walz tax exemption case (in 1970), "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion."¹⁰⁴ But, alas, this is not all the Court has said—and what it has said is neither clear nor persuasive. State legislatures have repeatedly tried to adjust their funding arrangements to the latest pronouncements of the Court, only to be repeatedly caught up short in the next round of litigation.

Members of the Court have tried to tell us from time to time what the law is; but they have succeeded only in exposing the unsteady foundation upon which all this rests. "Entanglement," for example, has been seen as something to be avoided in Church-State relations. But the Court's pronouncements, and restatements of those pronouncements, have tangled up matters more and more. Symptomatic of the tangles of Court doctrines is the folly of ruling out public support of field trips which actually get students out of church-sponsored

schools and into the very places (such as public museums) where public school children also go.¹⁰⁵

Various detailed judicial summaries are available of "the law." Consider, for example, Justice Brennan in Schempp, where he sees the Establishment Clause as having forbidden "those involvements of religion with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice."¹⁰⁶ But, as I have indicated, it is difficult to find in the First Amendment itself any prohibition of the use by government of sectarian institutions to serve secular ends when it is convenient (not only necessary) to do so.

It should be noticed that if everything about church-sponsored schools should be entangled with religion to the extent that the conscientious Justice Brennan and others believe, then it is difficult to justify any governmental regulation of anything of an intellectual nature which goes on there. But there is no doubt that the States have "always" been considered qualified, entitled and even obliged to pass on many aspects of these schools (not only health and safety standards, but academic standards as well). Does not this suggest that those schools have never really been considered in their entirety an essential part of the religious activity of the sponsoring churches? That is, no matter what a church itself may believe, a State can proceed on the basis of its own assessment of what that church's schools are doing and what the State expects from them.

Section 9. The original intentions of the Religion Clauses of the First Amendment

of
The original intentions of the Religion Clauses of the First Amendment seem to me far simpler than one would suspect from the Court's convoluted

pronouncements of the past three decades. The Free Exercise Clause is today in better shape than the Establishment Clause, probably because (as I have indicated) the original intention of the former clause appeals more to contemporary inclinations than does the original intention of the latter clause. There is said to be some tension between the Free Exercise Clause and the Establishment Clause. But it should by now be evident that this results, at least in part, from misreadings of both clauses.

Consider, for example, one scholar's report of the Court's readings of these clauses: 107

In the Court's early efforts to articulate the contours of freedom of religion, there were repeated reliances on a distinction between "belief" and "action." At first, . . . the Court suggested that "free exercise" extended only to belief and did not reach conduct at all. More recently, the Court has increasingly come to acknowledge that conduct based on religious belief may sometimes claim exemption from general regulatory statutes because of the free exercise guarantee. That growing recognition in turn has brought inherent tensions between the free exercise and establishment clauses to the forefront. . . . When must regulatory statutes exempt religion-based conduct? When may a legislature exempt such conduct without violating the establishment clause?

The old answers to these two questions would have been (1) that religion-based conduct is to be treated like any other conduct (except for that religion-based conduct (a) which consists of attending religious services /but not necessarily everything that might happen at such services/ or (b) which consists of professing the beliefs that one has), and (2) that a legislature's exemption of any conduct from regulation is hardly likely to contribute to an establishment of religion unless there is also a more direct and obvious attempt to do so. These old answers, unfashionable though they now are, still seem to me quite sensible. 108

Justice Brennan, in his Lemon opinion, is concerned lest churches be pressured to make religious liberty compromises (including self-censorship) in order to qualify for public aid offered them in conformity with the Estab-

lishment Clause.¹⁰⁹ But religious faiths have always had to withstand the temptations of Mammon. Churches which consider themselves threatened can always pull out of government programs. That would be in order and may even be good for them in some instances (just as it may be for universities from time to time).

Of course, it may also be in order to reconsider the readings of the Establishment Clause which have led to difficulties. This clause of the First Amendment was designed (1) to keep the Federal Government from setting up a religious establishment of its own and (2) to keep the Federal Government from interfering with deliberate establishments of religion sponsored by various State Governments.

That State religious establishments were intended to be protected by the First Amendment has been conceded again and again by Justices of the Supreme Court and by constitutional scholars. Even so determined a separatist as Justice Brennan seems to recognize that the First Amendment may have been designed as much to hinder Federal interference with State establishments as it was to forbid a Federal establishment.¹¹⁰ Thus, it has been observed, "The purpose of the First Amendment was not to keep government and religion separated, but rather 'to forbid the Federal Government from interfering in the manner in which the State governments dealt with religion.'"¹¹¹ Another scholar observed,¹¹²

The First Amendment's establishment clause may have been designed primarily as a federalistic limitation: established churches existed in the states when the Bill of Rights was adopted; the main purpose of "establishment" may have been to keep Congress out of that area. Yet "incorporation" made "establishment"—arguably a "special," "non-liberatarian" limitation on the national government—effective against the states.

And so Justice Stewart could notice that it is ironic that "a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy."¹¹³

It should be evident, from any thorough study of the framing in 1789 of the First Amendment, that the prevailing opinion did not consider the State establishments bad in themselves. This is the opinion which is reflected in the First Amendment. James Madison may have thought otherwise, but even that is not clear. He could only say, in response to inquiries about the meaning of the proposal which was eventually to become part of the First Amendment, that he "apprehended the meaning of the words to be, that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."¹¹⁴

Madison did try to have various limitations in the Bill of Rights extended against the States as well, but this effort proved unsuccessful. Even so, his attempt did not include the establishment restriction, only the free exercise (or "rights of conscience") restriction.¹¹⁵ Nor was Thomas Jefferson, from whom the "wall of separation" language is drawn,¹¹⁶ representative of American opinion on this issue at the time of the framing and adoption of the First Amendment. One can find considerable evidence, therefore, to support the following conclusion: "It is argued that there is no basis in the legislative history of the First Amendment for assuming that the wording finally agreed on was the work of Madison any more than that of others, like Charles Carroll. . . . Further, it has been said that the views of the two Virginians /Madison and Jefferson/ regarding church-state relations were not representative of the other constitutional authors."¹¹⁷

It should also be evident that it was not the intrinsic badness of religious establishments which led to the prohibition upon the Federal Government setting up an establishment of its own. Rather, it was primarily the diversity of religious inclinations and establishments in the various States ^{that} made a Federal effort seem highly undesirable.¹¹⁸

If, then, establishments were not thought by the Founding Fathers to be always bad in themselves, consider how various Supreme Court opinions of the past three decades are to be understood when they invoke those Fathers' enmity toward any establishment of religion. This supposed enmity, retroactively read into the Constitution, is used as justification for scrupulous elimination of all aid to sectarian schools either by the Federal Government or by State Governments--and all this in the name of vigilance against something which is misconceived as an "establishment of religion."

Section 10. Questionable changes in the interpretation of the "establishment of religion" language of the First Amendment

I have argued that virtually all public aid to church-sponsored schools legislated since the Second World War can plausibly be seen as aid to education rather than as aid to the religious mission of the institutions sponsoring the schools.¹¹⁹ I must now argue that whoever the immediate beneficiaries of such aid may be, there is here no serious "establishment of religion" problem. Indeed, one could go further by arguing that even aid offered generally to the clearly religious missions of all our religious institutions would not constitute in our circumstances an establishment of religion. Of course, one need not go that far in argument--except in an effort to clarify what "establishment of religion" does and does not mean.

An awareness of circumstances is critical, for it helps one understand what the aid and regulations under consideration aim at or are likely to achieve. This means, among other things, that the public can stop or change what it is doing or permitting when it sees the results. Critical to the meaning of "establishment of religion" at the time of the writing (in 1789) and ratification (in 1791) of the First Amendment was, I have suggested, the sense of a marked preference by government for one or a few sects over all the others.¹²⁰ An "establishment of religion" prohibition would not rule out

aid or regulations which help all sects (whatever objections Madison or Jefferson might have had to taxing one man to support another's religion).¹²¹

There is about this interpretation of "establishment of religion," as originally understood, nothing complicated. Indeed, it is quite simple and amply supported by the available evidence. But, unfortunately for our understanding of constitutional law, it has not been the dominant interpretation by the Court in the Twentieth Century.¹²² Instead, there is the influential pronouncement by Justice Black for the Court in Everson, the first of the cases after the Second World War on the Establishment Clause:¹²³

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

To argue as I have for the simple definition of "establishment of religion" which was originally intended has been condemned by Justice Clark as a worthless "academic exercise." The Court, he insisted, has "rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another."¹²⁴ This rejection, he insisted, is no longer open to question.

Such is the attitude of partisans who, whatever they might concede to the ambiguity of the historical record, take refuge in what the Supreme Court happens to have decided to be "correct." But, it should by now be evident, judicial mandating of "correct" answers does not permanently settle questions

which depend on the nature of man, on the nature and hence the needs of communities, and on the conformity to one another of various parts of the Constitution.

The "free exercise of religion," I have suggested, would not necessarily be affected adversely even by a general program of the Federal Government to contribute to the religious life of the United States. Indeed, there have been numerous things we have done and supported to aid religious life in this country. Thus, it was conceded in Walz (in 1970) that tax exemption of church-owned property is clearly a form of indirect support for religious organizations. Such tax exemption was upheld in that case, but on the novel premise that taxation of church property would result in "excessive governmental entanglement with religion."¹²⁵ I doubt that it ever occurred to the American people in the Founding Period that a general tax exemption for churches created either an establishment problem or a free exercise problem. But then I doubt that it ever occurred to many Eighteenth Century Americans that their political institutions could do without a healthy religious life.

Do we really want to keep religion out of politics—as well as politics out of religion? Does it not depend on particular circumstances and specific proposals what we as a people should do or support?¹²⁶ The legitimate political and social interest in religion has something to do, of course, with the concern for morality which we have already considered.¹²⁷ This concern has even found expression in such Congressional enactments as the Northwest Ordinance of 1787, where it is said, "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." If Eighteenth Century schools could properly be "encouraged" (and this clearly included financial support from the public treasury) in order to promote religion and morality, why cannot

Twentieth Century church-sponsored schools be "encouraged" in order to promote morality and education, wherever the community deems it prudent to do so?

To say, then, that there is to be no establishment of religion--in the sense of particular sects being favored over all the others--does not mean that there is not to be an overarching religious view of things among the citizens of the country. Indeed, it might be impossible to have "a people" without such a view.¹²⁸ If (as it has been argued) man is by nature "a religious animal,"¹²⁹ the religious opinions and the religious life of a community cannot be simply ignored by the government of the day. Rather, the public and its servants must consider what contributes to the full development of a people. It should be evident that some governmental support of religion is consistent both with the lack of an establishment of religion and with the free exercise of religion. In fact, a healthy religious liberty may be impossible, or at least quite unstable, without some sensible public (but not necessarily financial) support of religion.

It should be evident from what I have said that an insistence upon an "absolute command" in the First Amendment which mandates "neutrality" between government and religion is both naive political science and unsound constitutional interpretation.¹³⁰ Justice Clark, in speaking for the Court in Schempp, could say, "The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concern or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies."¹³¹ The neutrality which has come to be made so much of can include the doctrinaire insistence by Justice Harlan (in one of the con-

scientious objectors cases) that the Establishment Clause does not permit government to "draw the line between theistic or nontheistic religions on the one hand and secular beliefs on the other."¹³²

To point out that Americans have traditionally permitted (and expected) government support of religion does not mean that such support can never pose threats to the free exercise of religion. Nor does it mean that some sects would not, if they could, secure special privileges for themselves--and consider themselves entitled, perhaps even obliged, to attempt to do so.¹³³

But, having said this, one should again notice that we need not see (nor would the Framers have seen) aid to church-sponsored schools as aid to any religious mission but rather as aid to education. Education can be aided, no matter who offers the education and no matter what religious or other association benefits from it.¹³⁴

The discussion in this section has been devoted ^{for the most part} to the Establishment Clause of the First Amendment (as applied against either Congress or the State Legislatures), primarily as that clause bears on efforts to arrange publicly-funded support for some of the education provided by church-sponsored schools.¹³⁵ On the other hand, restrictions in State constitutions, either explicitly or by interpretation, often bar practices now sustained against attack under the First Amendment (such as publicly-funded transportation of parochial school students).¹³⁶

The more restrictive State provisions do not depend on either "establishment of religion" or "free exercise of religion" language. What these States did, a century ago, was to write into their constitutions the policy decisions of that day--and political considerations have compelled them to leave those constitutional provisions unchanged, even when circumstances have changed radically.¹³⁷ But however restrictive ^{the} Nineteenth Century language and

the attitudes of the States may happen to be, they should not be read back into the Eighteenth Century First Amendment.¹³⁸

Section 11. The use and abuse of the Fourteenth Amendment

Still another (related) issue said by the Court to have been "settled" is whether the First Amendment has been made applicable against the States by the Fourteenth Amendment. Of course, the fate of Title I programs does not depend on this determination, since it is clear that the First Amendment does apply to Congressional enactments. Still, questionable notions developed in Establishment of Religion cases with respect to State funding arrangements may now be brought to bear upon Federal funding arrangements.

There does remain, it seems to me, a serious question whether the Fourteenth Amendment makes applicable against the States whatever it is that the First Amendment provides.¹³⁹ It is commonly said that the Establishment Clause and the Free Exercise Clause of the First Amendment have long been made applicable against the States by the Fourteenth Amendment. And so it is said that it is "certainly too late in the day" to question this extension.¹⁴⁰

But, I must say, the Fourteenth Amendment was peculiarly framed if the intention of its framers was to have made applicable against the States the provisions of the Bill of Rights (such as those of the First Amendment) which had been originally directed only against Congress. Whatever may be supposed about some of the other articles in the Bill of Rights, would not more specific language than that of the Fourteenth Amendment be necessary to incorporate in it the First Amendment with its explicit concern only with Congressional conduct?¹⁴¹

This is particularly to be emphasized with respect to the Establishment Clause. Congress is told in the First Amendment that it must in no way concern itself with religious establishments; but it is prohibited only from laying

restraints (not from removing or reducing State or common law restraints) on the free exercise of religion, on freedom of speech or on freedom of the press. How can the States be limited by the application against them of a provision which was in large part intended (as we saw in Section 9) to protect them from Congressional interference with whatever religious establishments those States chose to have?

It should be noticed that various State constitutions had shown the framers of the Fourteenth Amendment how to shut off public funds to churches and to their schools. Strong opposition to the use of the State taxing power to support sectarian schools developed after the Jacksonian period, an opposition reflected (we have seen) in the State constitutions written subsequently.¹⁴² But that change in attitude, it bears repeating, should not be read back into the First Amendment to change the meaning of "establishment of religion"; nor can the First Amendment be considered to have been changed for the purpose of its incorporation into the Fourteenth Amendment. After all, the Fourteenth Amendment can extend against the States no more than either what the First Amendment said when it was ratified in 1791 or what it was taken to say at the time the Fourteenth Amendment was ratified in 1868.¹⁴³

In any event, the value of federalism should be remembered. Experimentation among the States should be encouraged. The "liberty" provision of the Fourteenth Amendment, as well as the Republican Form of Government guarantee, remains available for curbing the more blatant abuses of State authority in this as in other matters.¹⁴⁴

Section 12. A review of public policy considerations with respect to the public funding of education

The fundamental policy question, I suggested in Section 7, is, How do we want our children educated, wherever they may be found? Establishment of

Religion concerns particularly invite public policy consideration. But however uncomplicated the Religion Clauses may be, there is no simple formula which can be used to determine what contributes to, what moves us away from, an establishment of religion.¹⁴⁵

Do we want to have available, as one way our children are to be educated, private schools (church-sponsored as well as nondenominational)? If we want to have them available, should we support them? And if so, how much and how? These are variations of a more general question, Do we want, and want to support, various kinds of private charitable organizations dedicated to education, health, morality, welfare and the arts? Should we not be able to "farm out" to responsible organizations, religious as well as secular, various services and activities we want done? How much we want done (and how we want it done) should depend on our circumstances, not on how these matters happened to appear in the Nineteenth Century or in 1947 (the time of the Everson bus case).¹⁴⁶

We have noticed that, in all instances of reliance upon and support of private organizations to perform services or to carry on activities that government could undertake altogether on its own, regulation by the public may be called for to insure conformity to stipulated standards (whether or not these organizations are aided in what they do either by public funds or by tax ~~ex~~emptions). Of course, private organizations may prefer not to be thus regulated and can withdraw, at least to the extent that public regulation follows only from public funding.¹⁴⁷ On the other hand, the public can see that ^{if} it is to encourage private initiative, it may have to restrain itself in its regulations.¹⁴⁸

Many things have to be taken into account by the community in considering whether to support or even permit private organizations dedicated to education and welfare. (Many of these things have always been taken into account, even

though we may not realize it.) A half dozen (somewhat overlapping) sets of queries suggest the kinds of public policy considerations that bear on the education of our children:

1) Does the availability of alternative school systems undermine the unity of the country? Or does such availability relieve tensions, thereby permitting diverse peoples and elements to unite on other matters? An alternative for the more mobile families who do not have sound inner-city nonpublic schools available to them may be a flight from the city to suburban schools, whether church-sponsored or public.¹⁴⁹

2) Are church-sponsored schools today the best private education that can be made available to ordinary students in modest economic circumstances? Do we want people to have alternatives? Should the efficiency of church-sponsored schools be encouraged, not only as a corrective of monolithic and centralizing public education but also as the only alternative to public schooling for those poor people who are not mobile? Do the successes and failures of such schools point up what money can and cannot do?

3) What standards should be applied to private schools? Has it not always been assumed, and properly so, that States have the right and duty to make sure that various standards, including with respect to education, are maintained in private schools?¹⁵⁰

4) What proportion of our students, of our educational activities and of our community resources do we want allocated to public schools? Should not the proportion vary according to circumstances and consequences?¹⁵¹

5) Is it not in the public interest to help people practice their religious faiths more fully, if indeed that is what happens wherever there are church-sponsored schools, by making it easier for people to have the schools to which they are prepared to devote considerable effort and for which they have already made considerable sacrifice.¹⁵²

6) What pattern of funding is most likely to advance the desired amount and kind of local variations, local control and local experimentation? Does the channeling of public funds for education through public schools, for example, reinforce the centralizing and dominating character of those schools?¹⁵³ Does it have an adverse effect on the morale of private school teachers, administrators and students? How much of a Federal role do we want in education anyway (aside from the problems of private schools)? Certainly we do not want to discourage private initiative and sacrifice.¹⁵⁴ Nor do we want to destroy the public schools inadvertently.¹⁵⁵

7) What educational policy is most likely to lead to domestic tranquility and finer education? What leads to undesirable political divisiveness and strife? It should be evident that proper assessments here, too, depend on circumstances which vary from time to time. What is needed in these matters is political judgment, not judicial pronouncements. It should be evident, for example, that the large-scale Federal funding thought to be necessary for education in the years ahead will not be generally available to public schools if church-sponsored schools cannot be assured of getting what they consider their rightful share.¹⁵⁶

These half dozen sets of queries, based on public policy considerations, are obviously legislative, not judicial, in character. But, it should be noticed, there may be Equal Protection (as well as Free Exercise of Religion), and hence judicial, limitations upon how the public chooses to proceed. Thus, although the public need not (under my interpretation of the Constitution) permit private school education to exist at all as sufficient compliance with compulsory education requirements, it is still somewhat restricted in how it does what it may choose to do.¹⁵⁷

Equal Protection claims are already being made in courts against the exclusion of church-sponsored schools from a share in public expenditures.¹⁵⁸

Even more such claims--which claims are at bottom pleas for fair treatment--can be anticipated if constitutional restrictions on public aid to church-sponsored schools should be relaxed.¹⁵⁹ But we should be careful not to get back to Pierce by the Equal Protection route. The kinds of education systems we have, and how much of each, should be left to deliberate public decision.

Vital to what I have been saying about public policy considerations is the opinion that we as a community should control what is happening to the education of our children. Neither unrealistic fears about an establishment of religion nor unexamined notions about religious liberty should be permitted to stand in the way of Americans being sensible and hence fair about these matters.¹⁶⁰

Section 13. Prospects of constitutional litigation respecting Title I programs in church-sponsored schools

Questions of fairness and of common sense do remain in our handling of the problems of private schools, particularly church-sponsored schools, in this country.

There has been about the Court's opinions in these matters, as well as about several of the more prestigious commentaries, a curious lack of sophistication with respect to both politics and religion. One can see in these discussions the effects of suspicions and postures which go back to the middle of the Nineteenth Century.¹⁶¹ Times have changed, however--and this is most dramatically seen in the changed condition of, and consequent Protestant responses to, the Roman Catholic Church in this country in recent years.¹⁶²

The critical question remains whether we the public get from church-sponsored schools something we should want. Repeated efforts by legislatures to provide some public funding for such schools reflect, no doubt, the pressures of interest groups. But enduring interest groups do tend to have some-

thing to be said for them: aspects of justice and of the common good tend to be invoked by them.¹⁶³ One suspects that if courts were to restrain themselves for awhile, State and Federal Legislatures today would develop sensible political accommodations in these matters. And, of course, no religion would be established in the process. Nor would our precious religious freedom be threatened.¹⁶⁴

But, it should again be emphasized, to recognize that the Constitution poses no barrier to some public support of church-sponsored schools does not mean that such schools are automatically entitled to such support. Indeed, as I have argued, the position I take in this memorandum is consistent with our right and power to eliminate private schools altogether. Still, we can ask, Should we support (that is, pay for, at least in part) what we do get? What varieties and quality of schooling do we want? What kind of experimentation in programs and in costs do we need?¹⁶⁵

All this bears, of course, on how we should regard the services provided under Title I of the Elementary and Secondary Education Act to children in church-sponsored schools. Is it not reasonable to conclude that what is being supported by Title I is not religion, but rather the help which happens to be provided by church-sponsored schools to certain deprived children? The eligibility of such children is determined not by any church or church-sponsored school but by public school administrators' determinations keyed to economic conditions in "religiously neutral" geographical districts. Welfare criteria dominate such determinations. And welfare purposes can be said to have moved Congress in providing these funds.

To insist that the Title I services which have thus far been made available must henceforth be delivered "off-site" to children from church-sponsored schools would be to ensure that those children would get significantly less

help than their counterparts in the public schools. It should be evident from what I have said that the constitutional scruples on which such insistence would be based are sanctioned neither by constitutional language nor by common sense.¹⁶⁶

No doubt the Supreme Court of the United States can devise an argument which justifies what has been done since 1965 in making Title I programs available to underprivileged students in church-sponsored schools. This, it seems to me, the Court is likely to do even if it should not be moved to correct its overall constitutional doctrines of recent decades. After all, an Act of Congress is not lightly to be invalidated, especially one which has already seen billions of dollars expended on behalf of poor children and which has not yet promoted any perceptible movement among us toward the establishment of any religion.¹⁶⁷

It remains to be seen, however, whether judicial validation of participation in Title I programs by students in church-sponsored schools may not prove for those schools (and for American education as a whole) a Pyrrhic victory. For the expected validation can mean, if confined to the "low-income families" rationale,¹⁶⁸ that significant Federal disbursements on behalf of both public and private education in this country are to be limited (for many years to come) to the narrow (however deep) "welfare" channels carved out by the Elementary and Secondary Education Act of 1965.¹⁶⁹

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APPENDIX I

EXCERPTS FROM THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE,
IN THE SUPREME COURT OF THE UNITED STATES,
WHEELER v. BARRERA, 417 U.S. 402 (1974)

/The constitutional propriety of Title I programs for students in church-sponsored schools is argued, from the perspective of counsel friendly to the Title I legislation, in the excerpts set forth below from the January 1974 Brief for the United States in a case brought to the Supreme Court of the United States from the State of Missouri. The Supreme Court ruled, as requested in Point II of the Brief for the United States, that the court below had properly declined to pass on the First Amendment issues since, no order requiring on-the-premises nonpublic school instruction having been entered, the matter was not ripe for review. See Wheeler v. Barrera, 475 F.2d 1338 (8th Cir. 1973), 417 U.S. 402 (1974). See, also, Barrera v. Wheeler, 531 F.2d 402 (8th Cir. 1976); Mallory v. Barrera, 544 S.W.2d 556 (Mo., 1976). The case has not yet been decided on its constitutional merits. The Brief for the United States, in the excerpts set forth below, is useful for an informed analysis of some of the constitutional issues raised by Title I programs. It is an analysis which accepts as authoritative the Supreme Court's rulings and doctrines in the Religion⁶ Clauses cases. That analysis has been brought up-to-date, so to speak, by my October 1977 analysis of a recent case and its implications for Title I programs. My 1977 analysis is set forth in Appendix II, below./

Questions Presented

1. Whether Title I of the Elementary and Secondary Education Act, 20 U.S.C. 241a, et seq., requires that public school teachers provide special educational services, such as remedial reading, on the premises of religiously-affiliated private schools.
2. Whether Title I, to the extent it permits such services, violates the Establishment Clause of the First Amendment.

Argument

- I. Title I of the Elementary and Secondary Education Act of 1965 Authorizes But Does Not Require Public School Teachers to Furnish Remedial Educational Services on Private School Premises

Both the language and the legislative history of Title I show that, although Congress intended that all educationally deprived children, whether enrolled in public or private schools, were to receive the remedial educational programs for which the statute provides, it also gave the local educational agencies great latitude in devising programs to accomplish that objective. Title I provides for grants to local educational agencies "upon application therefor approved by the appropriate State educational agency, upon its determination (consistent with such basic criteria as the Commissioner may establish)" that several standards have been met (20 U.S.C. 241e (a)). These include that the programs will be "designed to meet the special educational needs of educationally deprived children . . ." (20 U.S.C. 241e(a) (1)(A)), and will be "of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs . . ." (20 U.S.C. 241e(a)(1)(B)). Title I also requires that "to the extent consistent with the number of educationally deprived children in the school district . . . who are enrolled in private . . . schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate" (20 U.S.C. 241e (a)(2)).

The Senate Committee report on Title I stated:

. . . consistent with the number of educationally deprived children in the school district who are enrolled in nonpublic . . . schools, the local educational agency will make provision, under the terms of the act, for including special educational services and arrangements. . . .

It should be emphasized, however, that no suggested program is in itself mandatory upon a public school authority. The selection of an appropriate program or programs, for which State educational authority approval is sought, rests with the local educational agency.

Thus, the act does anticipate broadened instructional offerings under publicly sponsored auspices which will be available to . . . students who are not enrolled in public schools /S. Rep. No. 146, 89th Cong., 1st Sess. 11-12/.

Similarly, the House Committee report on the 1966 amendments to Title I, which were made the year after the statute was enacted, pointed out:

From the earliest consideration of the Elementary and Secondary Education Act it was the intention of the committee that educationally deprived children be reached by the public school system regardless of the school a child regularly attended. Thus, it was provided that public programs would be offered to educationally deprived children enrolled in non-public schools without requiring those children to be in fulltime attendance in the public school. Extremely broad authority was therefore given local school districts in the types of projects and programs that they could devise, including health and welfare projects only indirectly related to elementary education, in order to assure that such programs and projects could operate as a part of the public school system in conformance with local and State legal and constitutional requirements. /H. Rep. No. 1814, 89th Cong., 2d Sess. 3-4/.

The Senate Committee report on the Act made it clear that, where necessary to accomplish the objectives of Title I, public school teachers could provide special remedial educational services on private school premises. It stated:

It is anticipated, however, that public school teachers will be made available to other than public school facilities only to provide specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services) and only where such specialized services are not normally provided by the nonpublic schools /S. Rep. No. 146, 89th Cong., 1st Sess. 12/.

See, also the remarks of Rep. Carey and Rep. Perkins, managers of the House Bill, 111 Cong. Rec. 5747-5748.

The regulations of the United States Commissioner of Education, which mainly track and amplify the statutory standards, and the guidelines of the Office of Education confirm that the local educational agencies have broad discretion to select the particular method of providing Title I services that they consider most appropriate. For example, the regulations provide that applications by local educational agencies "must propose projects of sufficient size, scope and qualify as to give reasonable promise of sub-

stantial progress toward meeting the needs of educationally deprived children for whom the projects are intended" (45 C.F.R. 116.18(a)). The Commissioner's Title I Program Guide No. 44, 4.5 (1968) states: "The needs of private school children in the eligible areas . . . may require different services and activities." Similarly, the Office of Education's handbook provides:

Basically the law requires that the local educational agency (LEA) must provide special educational services for educationally deprived children enrolled in private schools. . . . Nowhere is a particular method prescribed or mandated /Title I ESEA Participation of Private School Children, A Handbook For State and Local Officials, p. 1/. //Note 5: See also letter of July 3, 1967, by the Assistant Commissioner of Education, stating: ". . . Title I does not require that private school children be served through any particular types of arrangement" (Def. Ex. 7, Vol. VII, Appendix in Court of Appeals). //

The court of appeals thus correctly stated (Pet. App. A26) that "no particular program, curriculum or service is mandatory under the Act." In recognition of the special problems involved in providing remedial services to educationally deprived children who may have a variety of different problems that require correction, Congress and the Commissioner of Education wisely left it to the informed judgment and discretion of the local education agencies to determine how such services can best be provided to the children requiring them. //Note 6: In exercising this discretion some local educational agencies in Missouri have indicated their desire to provide Title I services during regular school hours on private school premises, but they were prevented from doing so by a State Department of Education regulation prohibiting public school teachers from going onto the premises of a private school during such time. This regulation is based on the Education Department's determination (contrary to an opinion of the Missouri Attorney General, No. 26, 1970) that Title I funds are subject to proscriptions in the state

constitutional against the use of public funds to provide services to private school students (Pet. App. A19-A20). // This discretion is subject to the Commissioner's supervisory authority to insure that the local programs meet the "basic criteria" that he has "establish~~ed~~" (20 U.S.C. 241e(a)) to insure compliance with the Congressional purpose of "meeting the special educational needs of educationally deprived children" (20 U.S.C. 241a). This flexibility enables the local educational agencies to develop adequate programs for children attending religiously-affiliated schools which take account of any special provisions of state law governing such schools, such as prohibitions upon dual enrollment of children in both private and public schools.

In order to insure that any difference between the programs provided for public and private school children do not result in supplying the latter with inferior services, the Commissioner has required that Title I programs for private school children must be

. . . comparable in quality, scope and opportunity for participation to those provided for public school children with needs of equally high priority /Commissioner of Education, Title I Program Guide No. 44, 4.5 (1968)/.

Here, as in the Act and other regulations and guidelines, the Commissioner has merely directed that the Title I services provided to private school children must be "comparable" to those provided to public school children. He has not attempted to direct the local educational authorities how to insure that comparability or what form it should take. He has not even suggested, let alone provided, that such comparability should be achieved by having public school teachers provide Title I services on private school premises. He has left it to the local educational agencies to make that decision.

Similarly, the court of appeals has not directed, although it has permitted, such use of public school teachers in providing comparable Title I services to private school children. The court did hold that the district

court had erred in concluding that the Commissioner's "comparability" standard was satisfied by providing the private school children with a proportionate dollar amount of Title I services since this remedy failed to consider whether the services furnished private school children, such as after-school or summer classes, offered a promise of success equal to those afforded public school children. Concluding that the methods previously used by the local agency (after-school classes and summer programs) did not provide such a comparable program, the court remanded the case to the district court for the development of guidelines which would assure Missouri private school children "participation in a meaningful program . . . comparable in size, scope and opportunity to that provided eligible public school children" (Pet. App. A29-A30). //Note 7: In view of the uncontroverted testimony of educational experts that such after-school programs for private school children are not comparable in effectiveness or promise of success to those provided during the regular school day for public school children, the court of appeals correctly held that such services do not meet the requirements of the Act and regulations (Pet. App. A11-A16).//

The court of appeals' statement (Pet. App. A25) that "when the need of educationally disadvantaged children requires it, Title I authorizes special teaching services . . . to be furnished by the public agency on private school premises" does not indicate that the State was required so to use public school teachers. To be sure, the court of appeals recognized (Pet. App. A23-A24) that if Missouri law precludes the furnishing of "comparable programs" for private school children, the consequence would be that the State either would have to change its laws "or deprive all its educationally disadvantaged children of the economic benefits of the Act." In that situation, however, the choice would be for the State to make, and the State would be required to

choose not because federal law requires that public school teachers supply the services on private school premises but because the State itself provides that the services cannot be furnished in the private schools.

Title I and the Commissioner's regulations require only that there be no discrimination between private and public school children in the furnishing of remedial educational services; they leave it to the local agencies to determine how they will provide comparable services to both categories of children.

II. This Court Should Not Decide Whether The Provision Of Title I Services On Private School Premises Is Constitutional, Since The Question Is Presented In A Hypothetical And Abstract Context Which Is Not A Proper Framework For Resolving The Issue.

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III. The Use Of Public School Teachers To Provide Remedial Educational Services To Educationally Deprived Children On Private School Premises Would Not Violate The Establishment Clause Of The First Amendment.

If, contrary to our submission in Point II, the Court should conclude that the constitutional issue is ripe for decision, then we submit that the use of public teachers to provide Title I services on the premises of religiously-affiliated schools would not violate the Establishment Clause of the First Amendment.

A. Title I is a religiously neutral statute that provides educational benefits comparable in form and scope to those that this Court has upheld under the Establishment Clause.

The present statute, unlike the legislation aiding religiously-affiliated schools which this Court has recently invalidated (see Lemon v. Kurtzman, 403 U.S. 602; Levitt v. Committee for Public Education & Religious Liberty, No. 72-269, Committee for Public Education & Religious Liberty v. Nyquist, No. 72-694, and Sloan v. Lemon, Nos. 72-459 and 72-690, all decided June 25, 1973), was not designed primarily to provide financial assistance to private schools. Its purpose was to enable local educational authorities to meet "the special educational needs of educationally deprived children" (20 U.S.C. 241a), no matter what schools they attend. As noted (supra, . . .), fewer than 6 percent of the children in this country who received Title I aid in fiscal year 1971 were enrolled in private schools. The figures for Missouri are comparable. In Kansas City, where the respondents live, about 7,000 public school children were enrolled in Title I programs; it was estimated that there were 355 educationally deprived private school children residing in the eligible attendance area (Pet. App. A8), who presumably also would receive the services.

In contrast, the two State aid programs struck down in the Lemon case were specifically designed to alleviate the financial situation of the States' non-public schools and provided benefits only to those schools. Lemon, supra, 403 U.S. at 606-607, 609; Sloan, supra, slip op. 1-2. Similarly, the New York programs which this Court invalidated last Term in Levitt and Nyquist involved various forms of financial aid given solely to non-public schools.

The form and scope of the educational benefits provided under Title I are comparable to those which this Court has upheld against challenges under the Establishment Clause in such cases as Everson v. Board of Education, 330 U.S. 1, where the State reimbursed parents for bus fares paid for transporting students to public and private schools; Board of Education v. Allen, 392 U.S. 236, involving a State plan under which public school authorities lent text books

without charge to all students of the State, including those attending private schools, and in which the Court cited with approval its prior statement in Everson (330 U.S. at 16-17) that "the Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation" (392 U.S. at 242); and Tilton v. Richardson, 403 U.S. 672, where the Court upheld the constitutionality of the Federal Higher Education Facilities Act of 1963, under which federal grants were made to colleges and universities, including religiously-affiliated ones, for the construction of facilities to be used for secular educational purposes.

Like the programs upheld in those cases, the Title I program is religiously neutral. It provides remedial educational services for all educationally deprived children, no matter which schools they attend. It is not designed to aid private schools. Indeed, since the remedial educational services to be provided under Title I are required to be supplementary to those "made available from non-Federal sources" (20 U.S.C. 241e(a)(3)(B)(i)—i.e., they must be in addition to those the schools normally provide—Title I may fairly be viewed as not providing any aid to the religiously-affiliated schools in their normal operations. To whatever extent Title I does provide government aid to religiously-affiliated schools, therefore, the aid is at most indirect and peripheral. It is a far cry from the types of government assistance to religiously-affiliated schools that this Court has previously invalidated under the Establishment Clause.

B. Title I meets the criteria this Court has applied for determining whether a statute satisfies the Establishment Clause.

In Committee for Public Education v. Nyquist, supra, the Court summarized the "well defined three-point test that has emerged from our decisions" (slip op. 14) that, "to pass muster under the Establishment Clause," a statute

first, must reflect a clearly legislative purpose, second, must have a primary effect that neither advances nor inhibits religion, and, third, must avoid excessive government entanglement with religion /slip op. 15, citations omitted/.

Title I satisfies all three of these criteria.

1. Title I Has a Clearly Secular Purpose.—As petitioners themselves recognize (Br. 29), Title I has a secular purpose. As previously explained (*supra*, pp. 7-9, 17-19), the aim of Congress was to provide important remedial educational services to all educationally deprived children without regard to whether they attend public or private schools. The objective was not to aid religiously-affiliated schools but to help educationally deprived children regardless of the schools they attend.

2. Title I neither Advances nor Inhibits Religion.—As explained above (pp. 7-9, 17-19), Title I is religiously neutral. It provides remedial educational services to all children, including those attending private schools. No governmental funds are given to the private schools or used to pay teachers for conducting regular instruction in those schools. The educational services provided supplement the regular curriculum, and are performed exclusively by employees of the public educational agencies.

There is nothing in the Title I programs that furthers or aids the private schools in conducting the religious aspects of their educational programs, or inhibits them from doing so. Although the provision of Title I remedial services on the premises of religiously-affiliated schools could make those schools more attractive to the parents of children attending them, that collateral benefit is "not such support of a religious institution as to be a prohibited establishment of religion within the meaning of the First Amendment" (*Board of Education v. Allen*, *supra*, 392 U.S. at 242; see, also, *Everson v. Board of Education*, *supra*, 330 U.S. at 17-18).

Petitioners contend (Br. 30-34), however, that Title I and the Commissioner's regulations constitute a prohibited support of religion because they contain no effective safeguards to insure that the public school teachers will not utilize the remedial educational instruction as a vehicle for inculcating religious beliefs. This possibility is so unlikely and remote that it affords no basis for concluding that the Title I program constitutes government support of religion.

As we have explained (supra, . . .), the Title I programs are formulated, administered and operated by the public educational agencies. The teachers providing the services, no matter where they do so, are employed by and under the complete control of the public agencies. //Note 8: Petitioners contend (Br. 11, 27), on the basis of one law review article and two studies dealing with Title I in New Jersey and New York, that Title I teachers are actually recruited and controlled by the religious institutions. No evidence regarding those programs, or recruiting of teachers for Missouri programs, was presented in the district court. Accordingly, consideration of this contention would be inappropriate at this time.// Accordingly, there is not here present the "potential for conflict" that concerned this Court in Levitt v. Committee for Public Education & Religious Liberty (No. 72-269, decided June 25, 1973, slip op., 8), which struck down a New York statute providing grants to religious schools to prepare State-required examinations. There the Court noted (ibid.) "the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." See Lemon v. Kurtzman, supra, 403 U.S. at 617, where this Court spoke of "the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education."

In the present case, in contrast, the religiously-affiliated schools would have no control over either the content of the special remedial instruction or the way in which the instruction were given. Those determinations would be made by the public educational authorities solely on the basis of the secular standards provided in Title I and the Commissioner's regulations and guidelines. The public school teachers providing the services would not be subject to the authority and discipline of the people running the religiously-affiliated schools, but only to the control of the public agencies which hire, pay and direct them. As Mr. Justice Brennan pointed out, in explaining his vote to deny certiorari in Nebraska State Board of Education v. School District of Hartington, 409 U.S. 921, where the lower court had upheld the provision of Title I remedial reading and remedial mathematics services to both public and private school students upon premises the school district had leased from a Catholic school:

/T/he school district would have no part whatever in the curriculum of the parochial school either by way of subsidy of its costs through financing of teaching or otherwise. The remedial reading and remedial mathematics courses would operate completely independently of that curriculum and of the Catholic school administration /id., at 926/.

3. Title I Involves No Excessive Government Entanglement with Religion.--

The basic character of the Title I programs--under which employees of local educational authorities working under the control and supervision of those authorities provide supplementary remedial educational services to educationally deprived children pursuant to plans formulated and administered by the public authorities--insures that the programs will not involve excessive government entanglement with religion.

The contrary argument of petitioners (Br. 34-42) and amicus curiae Missouri Coalition for Public Education and Religious Liberty (Br. 28-36) relies mainly upon Lemon v. Kurtzman, supra. There this Court invalidated

two State plans for providing financial aid to private schools, because they involved excessive government entanglement with religion. The aspects of those plans which constituted such entanglement, however, are not present in the Title I programs.)

The two State plans struck down in those cases involved direct State grants (1) to private schools for the costs of teaching secular subjects and (2) to teachers of secular subjects in those schools. The administration and control of the teaching and the content of the secular courses were under the direct supervision and control of the religiously-affiliated schools. In those circumstances, as the Court noted, the State inevitably would be required to conduct "comprehensive, discriminating, and continuing surveillance" of the schools to assure that the secular purposes of the financial aid were observed (403 U.S. at 619).

In contrast, there would be no occasion for such public surveillance of private schools in connection with the operation of Title I programs. Those programs require no distinction to be made between secular and sectarian subjects, and are conducted by employees of public educational agencies under the complete control of those agencies. //Note 9: Of course, there will be circumstances in which the public educational authorities will review the performance of Title I teachers who provide services on private school premises. But the purpose would not be, as petitioners suggest (Pet. Br. 36-37), to determine whether the teachers are fostering religion, but whether they are teaching effectively. This review would be required whether particular teachers teach in public or private schools, or in both.//

There is similarly no likelihood that providing Title I services on private school premises would create the serious potential for political divisiveness that also concerned the Court in Lemon (403 U.S. at 622-624). The State plans there involved annual legislative appropriations "that benefit relatively

few religious groups" and that were thus likely to intensify "p/olitical fragmentation and divisiveness on religious lines" (id. at 623). The Court distinguished (ibid.) Walz v. Tax Commission, 397 U.S. 664, which upheld State tax exemptions for real property owned by religious organizations and used for religious worship, on the ground that the decision "dealt with a status under state tax laws for the benefit of all religious groups," where the likelihood of such "p/olitical fragmentation and divisiveness" was much less.

In the present case, unlike the State plans involved in Lemon, the statute is not desinged to benefit religiously-affiliated schools at all, and whatever benefits it may give them is collateral and incidental. Only about 5 percent of the children who would receive benefits under Title I attend private schools. "In terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor" (Nyquist, supra, slip op. 36). In the present case, as in Allen and Eversop, "the class of beneficiaries included all school children, those in public as well as those in private schools" (id. at 24, n. 38, emphasis in original). Here as in those cases, there is not sufficient potential for creating divisiveness to constitute a prohibited governmental entanglement with religion.

APPENDIX II

TITLE I PROGRAMS AND CONSTITUTIONAL ADJUDICATION

by George Anastaplo

/This memorandum, of October 3, 1977, was appended to Thomas W. Vitullo-Martin's "Interim Report. Summary Delivery of Title I Services to Non-Public School Students," submitted October 10, 1977, to Compensatory Education Evaluation Study, National Institute of Education, Department of Health, Education and Welfare. Both his interim report and this memorandum have been reprinted (with slight editorial changes) in Hearings Before the Subcommittee on Elementary, Secondary, and Vocational Education and Labor, House of Representatives, 95th Cong., 1st Sess., on H. R. 15 (Hearings held in Washington, D. C., October 6, 18, 19, and 20, 1977), Part 16, pp. 555, 570. The research project for which these papers were prepared is identified further at page 76, below. See the headnote for Appendix I, above./

I.

The opening lines, in the Opinion of the Supreme Court of the United States in Wolman v. Walter (June 24, 1977), read, "This is still another case presenting the recurrent issue of the limitations imposed by the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment. . . . on state aid to pupils in church-related elementary and secondary schools," 433 U.S. 229, 232 (1977). These lines remind us that it has long been difficult to determine with assurance what the law in this matter is and what it is likely to be.

Our immediate concern in attempting such a determination is with Title I programs, particularly as they appear in the light of what the Court has said and done in Wolman v. Walter. I take as a useful description of the Title I programs for this purpose Thomas Vitullo-Martin's draft report to the Compensatory Education Evaluation Section, National Institute of Education, "On the Comparability of the Involvement of Non-public School Children in ESEA Title I

Programs" (August 16, 1977), p. 13:

Title I of the Elementary and Secondary Education Act of 1965, as amended in 1974 (also known as the Compensatory Education Act), is broadly formulated to provide remedial educational services to children whose education is hindered by their environments. Public school districts, at their discretion, may request to be considered a "local education agency" (LEA) to administer Title I. Title I charges LEAs with responsibility for delivering remedial education services to eligible children within their jurisdictions. All children meeting standards (relative to the local community) for residence in low-income areas, and low rates of scholastic progress are eligible for the program. Eligible children may attend public or private schools or various types of juvenile institutions. Their eligibility is not a function of the type of institution they attend. Allocations are made to states and qualifying sub-units by a formula which considers each area's low-income school age population, weighted by the count of children receiving supplemental public aid. Hence, all children residing in an area are counted for purposes of establishing the allotment. The allotment is not determined by the public school registry, or even by the register of all schools in the area. It includes non-public school students and children not attending school.

II.

To devote myself primarily to Wolman in this memorandum is not to deny that various of its predecessors may be more critical. But its predecessors do come to bear on this problem, at least for the moment, as they are reinterpreted in Wolman. One suspects that these matters keep being raised, and keep being reinterpreted, because they have yet to be settled right. Certainly, legislation has again and again to be reviewed in the wake of repeated adjustments by State legislatures to judicial determinations.

Thus, the statute considered in Wolman was an attempt by the Ohio legislature to provide aid to church-related schools (or to the students of such schools) in forms which would conform to the strictures laid down in Meek v. Pittenger, 421 U.S. 349 (1975). It is quite evident in these cases that a determined effort is being made by supporters of non-public schools to draw upon public resources (Federal as well as State) for some support of their schools.

That is, the rising cost of running all schools and the growing competition for children of school age have moved non-public school supporters to try, even more vigorously than before, to secure for their schools some of the money non-public school parents and supporters pay as taxpayers. These advocates confront, however, determined resistance by those who regard any allocation of public funds for these purposes to be a blatant, and serious, affront to the constitutional principles incorporated in the First Amendment. The issue becomes, then, that of "fair shares" against "religious liberty."

III.

The Court in Wolman held constitutional "those portions of the Ohio statute authorizing the State to provide nonpublic school pupils with books, standardized testing and scoring, diagnostic services, and therapeutic and remedial services." It held unconstitutional "those portions relating to instructional materials and equipment and field trip services." 433 U.S., at 255.

It is perhaps instructive to notice just how much support on the Wolman Court the public funding of each of these six items had:

- | | |
|--|---------|
| 1) Diagnostic services (on-site) | 8 votes |
| 2) Therapeutic and remedial services (off-site). | 7 votes |
| 3) Textbook loans | 6 votes |
| 4) Standardized testing and scoring services | 6 votes |
| 5) Field trip services | 4 votes |
| 6) Instructional materials and equipment | 3 votes |

Various other disbursements seem to be temporarily "settled." The Court can be expected to be unanimous, or virtually unanimous, that tax-exemptions for the property of church-related schools and the publicly-funded provision of bus rides, free lunches and public health services remain constitutional. Thus, Justice Marshall, who dissented (for the most part) in Wolman, suggested that the line "should be placed between /1/ general welfare programs that serve children in sectarian schools because the schools happen to be a conven-

ient place to reach the programs' target populations and [2] programs of educational assistance." 433 U.S., at 259. (He questions the propriety of the textbook loans which go back to Board of Education v. Allen, 392 U.S. 236 [1968].)

Still other disbursements also seem to be temporarily "settled" (but in another way). A majority of the Court, as presently constituted and on the basis of current precedents, can be expected to continue to hold that any direct financial support of church-related schools or teachers, or, it seems, any tuition reimbursements of the parents of church-related school children, is unconstitutional. (The field trip services and the provision of instructional materials and equipment were said in Wolman to look too much like such direct financial support.)

Two sets of factors seem to be taken into account by various members of the Court. One set has to do with the on-site, off-site distinction; the other has to do with the public health services, educational program distinction. The more the publicly-funded activity looks like public health services, the more likely it is to be upheld. Also, the farther the publicly-funded activity is from the site of the church-related school, the less vulnerable it is. Thus, if the critical decisions, about the contents of textbooks or of tests are made elsewhere than in non-public schools, then that is somehow more like the public disbursement of health services, less like public interference in the educational policies of church-related school. (Are field trips, despite their separation from the usual school site, too much like educational programs? Does the school site somehow move with the bus used for the field trip?)

IV.

The student of these cases, as he attempts to make sense of them, sometimes suspects that their disposition--the determination of what is permis-

sible, what is not—is somewhat arbitrary. Indeed, one might even wonder whether the Court got off on the wrong foot from the outset of the modern development in Everson v. Board of Education, 330 U.S. 1 (1947). Did it get off on the wrong foot, not in the disposition of Everson (which permitted the funding of bus rides for parochial school children) but in some of the language of Everson (which assumed that aid to the educational activities of a church-related school is, for constitutional purposes, also aid to the religious mission of the church sponsoring the school)?

The Everson language is drawn upon by Justice Stevens in his (mostly dissenting) opinion in Wolman, when he says, "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 438 U.S., at 265. "Under that test," he goes on to argue, the "financing of buildings, field trips, instructional materials, educational texts, and schoolbooks are equally invalid. For all give aid to the school's educational mission, which at heart is religious." But he does concede, as has Justice Marshall, that the "State can plainly provide public health services to children attending nonpublic schools. The diagnostic and therapeutic services here may fall into this category. Although I have some misgivings on this point, I am not prepared to hold this part of the statute invalid on its face." 433 U.S., at 265-266.

Thus, Justice Stevens lends tentative support to the provision of on-site diagnostic services and to the provision of off-site therapeutic and remedial services. Justice Marshall provides support only for the diagnostic services. And Justice Brennan supports none of these services in the context of a statute which he considers constitutionally offensive in its entirety. Indeed, one suspects that this substantial minority of the Court might also wonder whether

the Court got off on the wrong foot in Everson--not in the language, however, but in permitting even the funding of an innocuous bus service which has led to various other exceptions to what had started as salutarily comprehensive separationist language. That is, these members of the Court might now wonder whether Justices Jackson and Rutledge were correct in their original Everson dissents.

V.

Justice Brennan seems particularly appalled by the amount of money provided by the Ohio legislature for the program being approved by the Court: "Ingenuity in draftsmanship cannot obscure the fact that this subsidy to sectarian schools amounts to \$88,800,000 (less now the sums appropriated to finance the invalidated field trip services and the invalidated instructional materials and equipment) just for the initial biennium." 433 U.S., at 256. Justice Stevens responds to this concern: "Like my Brother Brennan, I am concerned by the amount of money appropriated under this statute. But since the Court has invalidated so much of the program, only a much smaller amount may still be involved." 433 U.S., at 266, n. 4.

I cannot tell from the opinions precisely how much of the appropriation is left standing by the Court. It does seem to me, however, that it is closer to Justice Brennan's \$88,000,000 than to Justice Stevens' "much smaller amount." Be that as it may, is it not evident that hundreds of millions will now be directed, in State legislatures across the land, to those activities which seem (at least for the moment) to be constitutionally permissible? And as that happens, will that development oblige the Court to reconsider the expenditures of public funds it has permitted to be made on behalf of students in church-related schools? Will expenditures of that magnitude oblige the Court to decide, "once and for all," what is to be considered authoritative in Everson and its progeny, the comprehensive language or the expanding exception?

Insofar as magnitude of expenditures makes some Justices of the Court particularly sensitive to constitutional concerns, however, we need not wait for increased State expenditures. There are the already vast expenditures under the Title I programs first established by Congress in 1965.

VI.

What, then, should we expect from the Court if it should review the Title I programs? May the magnitude of the expenditures themselves make it appear that the American taxpayer has inadvertently stumbled into the business of heavily subsidizing the educational activities of church-related schools? Or will the specialization of these expenditures, directed as they are to poverty-related deficiencies, be seen as essentially a public-health-like service, if not even as a kind of affirmative action effort (insofar as poverty is related to racial discrimination)?

There is little one can safely predict about precisely how the Court is apt to respond to the sheer magnitude of expenditures under Title I. The Justices can range in their responses from "My God! What have we let ourselves in for?" to "This has been going on for a decade now—and it seems to have had little or no adverse effect on religious freedom!" But that the Court would completely invalidate the Title I programs, as they bear on the church-related schools, seems to me highly unlikely. Conditions may be laid down, however, and more restrictions may be insisted upon.

One critical problem is likely to be whether educational aids can be provided on-site for substandard performers in the church-related schools. Wolman does permit diagnostic services on site, but it emphasizes that the therapeutic and remedial services it permits happen to be off-site. (Some of the Justices wondered whether a mobile unit next to school is really "off-site.") On the

other hand, to insist that delivery of the considerable services (under Title I) be off-site may be to insist upon considerable interference by government with the normal administration of the church-related schools. Such interference could be so considerable as to have constitutional significance. Should, then, the on-site prohibition be waived?

Yet once the Court permits obvious educational services, even though of a remedial character and even though performed by public employees, to be delivered on a large scale at the site of church-related schools, relatively little may seem to be left of any constitutional restriction upon public support of the educational activities of church-related schools. Indeed, the only thing then effectively prohibited would be direct financial support of such schools and of the teachers therein. The constitutional prohibition of even such support might then begin to seem artificial, especially if it should become evident that payment of money can sometimes be the least disruptive form of public aid!

Thus the arguments back and forth can be expected to go. It remains to be seen, therefore, whether the Court is prepared to ratify explicitly (and with what consequences) the delivery of publicly-funded educational services on the premises of church-related schools not put in the guise of the "general welfare" programs that even so strict a separationist as Justice Marshall seems reconciled to.

VII.

Is it not unlikely that programs as massive, and evidently as popular, as those provided under Title I for impoverished school children are going to be struck down for any reason at this stage of our political development? But is not the continued funding of these programs by Congress contingent upon a substantial share of the programs being made available as well to impoverished children in church-related schools?

It does seem to me rather unlikely that the Court, in the foreseeable future, is going to be willing and able to stand by any insistence that massive federal funding is not to be made available for elementary and secondary education in this country. But would not the denial of such funds to the support of some of the educational activities of church-related schools have that effect?

That is, the critical factor to consider in predicting how the Court will eventually come to view these matters—especially since relevant constitutional doctrines here are, to say the least, somewhat flexible—the critical factor may well be implicit in the Roman Catholic argument reported by Professor Vitullo-Martin at page 4 of his draft report: Parents who send their children to private schools pay twice for education at the local and state level; they will not permit the same pattern to be established at the federal level. Thus, neither federal funds will support public and private schools together or they will support neither.

NOTES

* This memorandum has been prepared as part of a study, "The Participation of Private School Students in ESEA Title I Programs," under Contract #400-76-Q109 (effective date, July 22, 1976). This contract, negotiated pursuant to 41 USC 252(c)(5) and PL 92318, was sponsored by the National Institute of Education, Compensatory Education Division, Department of Health, Education, and Welfare. (The Council for American Private Education, Washington, D. C., has participated in these arrangements.) Another part of this study, prepared in 1977 by the author of this memorandum, is set forth in Appendix I to this memorandum.

The Principal Investigator for the overall study is Thomas W. Vitullo-Martin, Consultant to the Council for American Private Education. (See notes 5, 6, below.)

The author of this memorandum, George Anastaplo, has been encouraged to set forth his own findings, speculations and conclusions on the subjects covered. The opinions expressed in this memorandum, therefore, are his, not necessarily those of the Principal Investigator, of the Department of Health, Education, and Welfare or any agency thereof, or of the Council for American Private Education.

Acknowledgment is here made by the author for the many useful suggestions made with respect to the text of this memorandum (pages 1-75) by Julia Vitullo-Martin and by Thomas W. Vitullo-Martin, for the assistance provided by the Council for American Private Education in the conduct of this study, and for the research support provided through the auspices of the National Institute of Education.

** George Anastaplo is Lecturer in the Liberal Arts, The University of Chicago; Professor of Political Science and of Philosophy, Rosary College; and (in 1978) University President's Distinguished Visiting Professor, Memphis State University. He also teaches annually at The University of Dallas and at The Clearing, Ellison Bay, Wisconsin. He served, from 1974 to 1975, as Research Director and Advisor, Governor's Commission on Individual Liberty and Personal Privacy, State of Illinois.

He holds the A.B., J.D., and Ph.D. degrees from The University of Chicago. He has been elected to The Order of the Coif and to Phi Beta Kappa. He was presented in 1975 the Harry Kalven, Jr. Freedom of Expression Award by the American Civil Liberties Union, Illinois Division. (See, for his publications, note 7, below.)

His home address is 5731 Harper Avenue, Chicago, Illinois 60637 (telephone: 312/363-4825).

1. The term, "church-sponsored schools," comes from Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472 (1973). See, e.g., the text at note 20, below.

I mean to include among "church-sponsored schools" all private elementary and secondary schools associated with some religious organization, whether or not Christian. (The Jewish schools here have few Title I-eligible students, except perhaps for recent immigrants from the Soviet Union. The Black Muslim schools are not inclined to participate in Government programs. Nor are the schools operated by Fundamentalist Christian sects.)

I refer, in this memorandum, principally to Roman Catholic schools because

i) these are (among the private schools) the ones which have most of the Title I-eligible students;

ii) these are the schools which are most suspected of "establishment" designs on the public treasury (see, e.g., note 37, below);

iii) Roman Catholics have enough influence in Congress to block large-scale educational appropriations in which they do not share (see note 156, below); and,

iv) considerable information is available about the Roman Catholic system. Consider, for example, an article in the Chicago Sun-Times, December 8, 1977, p. 14, by Roy Larson, which includes the following information:

Assets of the Roman Catholic Archdiocese of Chicago increased slightly during the 1976-1977 fiscal year, but the chancery office continued to operate with a sizable deficit; according to a report released Wednesday.

In its eighth annual financial statement, the nation's largest archdiocese listed assets of \$148,696,000 for the fiscal year that ended June 30. A year ago the comparable figure was \$146,937,000.

Not included in its list of assets was real estate--churches, schools, rectories and convents--valued for insurance purposes at \$1,010,000,000.

Money generated by local parishes through church collections, school tuition fees and various fund raising programs (like bingo) totaled \$143,146,000. The sum was \$134,015,000 in the 1975-1976 fiscal year. Despite efforts to balance its budget, the chancery, the central administrative office of the archdiocese, showed a deficit of \$1,986,000, con-

tinuing a pattern that began several years ago. Msgr. Francis A. Brackin, vicar-general, attributed the deficit to increased insurance expenses, the program that subsidizes financially strapped parishes and other unanticipated costs. . . .

Msgr. Brackin also said the chancery may be able to reduce its subsidies to inner-city parishes because many more prosperous parishes now are participating in a "sharing program" that provides direct parish-to-parish assistance for churches with serious money problems.

. . . . As usual, the church spent the largest amount of its money for its schools. School expenses totaled \$81,650,000, up from \$77,817,000 the previous year. Tuition and fees totaling \$38,970,000 covered less than half the cost of operating the schools.

See Andrew M. Greeley, The American Catholic: A Social Portrait (New York: Basic Books, 1977), pp. 164-186. See, also, notes^{53, 56}/85, 86, 164, 169, below.

The kind of public support available for church-sponsored schools is suggested by a Chicago Sun-Times account, June 30, 1977, p. 49:

Roman Catholic schools in the Chicago area have received more than \$500,000 worth of school books from the state of Illinois' free textbook program The sum represents a substantial share of the \$3.5 million appropriated by the Illinois General Assembly to fund the textbook program this year for all public and private schools in the state. The archdiocese's good fortune was apparently the result of aggressiveness by Catholic school officials here in applying for the funds coupled with a corresponding timidity among other schools after discouraging reports that the program was underfunded. . . .

The reader is urged to begin by reading Appendix I and Appendix II and then the text of this memorandum (pages 1-75) without reference to the notes. (Footnotes will usually be omitted from the quotations used in this memorandum.)

2. It has been said that "the relationship between church and state" is "the greatest subject in the history of the West." 15 J. of Church and State 355 (1973) (attributed to Emil Brunner).

4 This subject can raise deeprooted questions about civil society, about human nature, and even about the nature of divine revelation. (See note 169, below.) In modern times, particularly, these questions have been known to shake communities to their foundations--and this is so, it sometimes seems, no matter how the questions are answered.

This state of affairs seems in marked contrast to that of other times and places. Consider, for example, the Roman Empire, particularly in the Age of the Antonines:

The policy of the emperors and the senate, as far as it concerned religion, was happily seconded by the reflections of the enlightened, and by the habits of the superstitious, part of their subjects. The various modes of worship, which prevailed in the Roman world, were all considered by the people, as equally true; by the philosopher, as equally false; and by the magistrate, as equally useful. And thus toleration produced not only mutual indulgence, but even religious concord.

Edward Gibbon, Decline and Fall of the Roman Empire (Modern Library, n.d.), I, 11, 25-26. See ibid., I, 431-432, 453-454, 467, 504.

But since the "Enlightenment," it has come to be believed that it is illegitimate for magistrates to make allowances for the usefulness of various modes of worship. At the same time, our "philosophers" (that is, contemporary intellectuals) have become aggressive in their efforts to reduce the influence of these various modes. Indeed, their insistence upon "separation of church and state" has taken on the character of a religious cause. See note 164, below. See, also, notes 84, 85, 86, below. See, as well, note 115, below.

3. Public Law 89-10, 89th Congress, 1st sess. (April 11, 1965); 20 U.S.C. 241a et seq. This act includes the following "Declaration of Policy" (emphasis added):

In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in this title) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children.

(Expenditures pursuant to the Act, since 1966, have totaled some twenty billion dollars. New York Times, June 29, 1978, p. 35. "We are informed by

the Commissioner of Education that his most recent compilation of state reports (for fiscal year 1971) shows that approximately 6,000,000 public school children and 350,000 private school children received services under Title I." Brief for the United States as Amicus Curiae, January 1974, Wheeler v. Barrera, 417 U.S. 402 (1974), p. 6 (Appendix I, below).

4. Doris Kearns, Lyndon Johnson and the American Dream (New York: Harper & Row, 1976), p. 227. May not the assassination of a Roman Catholic President have made it easier for the public school group and the parochial school group to reach the accommodation described here?

This accommodation has been described in these terms as well (Chicago Tribune, April 11, 1978, sec. 3, p. 2):

To get through the congressional minefield at all back in 1965, P.L. 89-10 had to be delicately balanced. It had to give enough to parochial schools to disarm their champions, but not enough to heat the state-church issue to a red glow. It had to provide enough money to make a difference, but not as much or in such a way as to encourage successful protests of federal interference with a major state function. The problem was solved by making federal aid "categorical"—dedicated not to public education in general, but to specific target objectives

So P.L. 89-10 funds programs for disadvantaged pupils, pupils whose native language is not English, districts with many federal employees, and so on. The bill caters to and stimulates a variety of special interests, all naturally hungry for money, more money than before, more money than their competitors.

Basing categorical aid more on achievement levels than on family income makes sense, but there is need to be on guard against rewarding failure (as is done in nursing homes, where bedridden patients bring in more money than ambulatory ones).

Still another description is that by Justice Blackmun in his Opinion for the Court in Wheeler v. Barrera, 417 U.S. 402, 406 (1974):

Title I is the first federal-aid-to-education program authorizing assistance for private school children as well as for public school children. The Congress, by its statutory declaration of policy and otherwise, recognized that all children from educationally deprived areas do not necessarily attend the public schools, and that, since the legislative aim was to provide needed assistance to educationally deprived children rather than to specific schools, it was necessary to include eligible private school children among the beneficiaries of the Act.

5. Thomas W. Vitullo-Martin, "Interim Report. Summary Delivery of Title I Services to Non-Public School Students", submitted October 10, 1977, to Compensatory Education Evaluation Study, National Institute of Education, Department of Health, Education, and Welfare. Reprinted in Hearings Before the Subcommittee on Elementary, Secondary, and Vocational Education of the Committee on Education and Labor, House of Representatives, 95th Cong., 1st Sess., on H.R. 15 (Hearings held in Washington, D. C., October 6, 18, 19, and 20, 1977), Part 16, pp. 555, 558 (italics omitted).

6. Another report, on the delivery of Title I services to non-public school students, is being prepared by Professor Vitullo-Martin. His address is Apartment 503, 225 West 86th Street, New York, New York 10024 (telephone: 212/580-0383).

For additional descriptions of the Title I programs, see Appendix I, below; Stephen K. Bailey and Edith K. Mosher, ESEA: The Office of Education Administers a Law (Syracuse: Syracuse University Press, 1968); Leo Pfeffer, Church State and Freedom (Boston: Beacon Press, 1967; rev. ed.), pp. 601-604; John W. Calhoun, "The Elementary and Secondary Education Act and the Establishment Clause," 9 Valparaiso Univ. L. Rev. 487 (1975); Eugene Krasicky, "Problems Emerging in ESEA," 22 Catholic Lawyer 226 (1976). See, also, the Hearings cited in note 5, above.

7. George Anastaplo "Memorandum: Title I Programs and Constitutional Adjudication (October 3, 1977)," This memorandum was appended (with slight editorial changes) to the Interim Report cited in note 5, above, and has been published with it in the Hearings there cited, pp. 570, 572. It is also to be found in Appendix II, below.

My 1977 and 1978 memoranda on this subject have been anticipated by a talk

I prepared in 1961 on church and state problems (see note 97, below). That talk included the following observations:

The considerations we have raised today may seem relevant more for the legislator than for the judge. The question of federal aid to sectarian schools, if it should ever come to be litigated while the Supreme Court's present view of what "no establishment" means prevails, will probably come down to the resolution of a question of "fact": are funds allocated to sectarian schools given primarily, if not exclusively, to maintain the nonreligious part of the curriculum? Or, to put it another way, can a reasonable distinction be made (no matter what some sectarians themselves believe to the contrary) between the religious and the nonreligious aspects of the operations of these sectarian schools? I have raised the further question whether such a distinction should be insisted upon as a prerequisite for the allocation of federal funds in these circumstances.

Anastaplo; Notes on the First Amendment to the Constitution of the United States (University of Chicago doctoral dissertation, 1964), p. 785 (emphasis added). See, also, ibid., pp. 600f, 771f, 790f. See, as well, page 6, above, note 44, below.

See, for my discussions ^{of} both of ^{of} constitutional issues and ^{of} educational policy, The Constitutionalist: Notes on the First Amendment (Dallas: Southern Methodist Univ. Press, 1961); Human Being and Citizen: Essays on Virtue, Freedom and the Common Good (Chicago: Swallow Press, 1975); "The Babylonian Captivity of the Chicago Public Schools," Chicago Principals Reporter, Spring 1975, p. 7; also, my articles cited in notes 26, 38, 50, 103, 121, 126, 164, below. See, as well, the Privacy Commission Report (to which I contributed), cited in note 169, below.

8. Chicago Tribune, Dec. 18, 1977, p. 1; Chicago Sun-Times, Dec. 18, 1977, p. 2; Chicago Tribune, Dec. 21, 1977, p. 1; Chicago Tribune, Dec. 22, 1977, p. 1; Chicago Tribune, Dec. 30, 1977, p. 1.

See, for further developments with respect to these misappropriations, Chicago Tribune, January 5, 1978, sec. 3, p. 1; Chicago Tribune, January 27, 1978, sec. 3, p. 1; Chicago Tribune, February 22, 1978, sec. 1, p. 2.

9. On the other hand, State programs for nonpublic school students are apt to appear not as welfare disbursements but as efforts to provide parochial school

children the educational services already available to public school children.

See note 16, below. Textbook distributions can be different. See note 1, above.

When State programs for school children do appear as welfare-based, there can be difficulties in their implementation (wholly aside from the problem of participation therein by nonpublic school children). Consider, for example, an Illinois controversy (Chicago Journal, June 28, 1973, p. 3):

A major disagreement among /Chicago Board of Education members/ concerns the disbursement of state compensatory funds, frequently referred to as as "equalizer" funds. This money is allocated to the Chicago school system in addition to its regular state aid because the city has a large percentage of students from low-income families. The state program is similar to the federal Title I program, which distributes funds to schools with the greatest number of disadvantaged children. Unlike the federal program, however, state law doesn't "target" specific schools for aid, and the money now goes into the district's general fund. . . .

This "major disagreement" is of several years standing, as is evident from this report from the Chicago Tribune, December 19, 1976, 'sec. 1, p. 3:

A new /Chicago/ Board of Education issue emerged last week that potentially could have almost as significant an impact upon city public schools as a desegregation plan. It is whether millions of dollars in state aid spent at predominantly white schools with middle class children should be shifted to predominantly black and Latino schools with children from poor families. At stake is how \$173.7 million should be allocated.

The heart of the issue is a section of the 1973 state law on school finances providing for up to 75 per cent extra funding for each child from a low income family.

Legislation has recently been enacted in Illinois requiring that State money for economically deprived children follow those students to their individual schools.

Chicago Tribune, August 1, 1978, p. 1.

10. Everson v. Board of Education of the Township of Ewing, 330 U. S. 1 (1947). A familiarity with the cases and with such practices as "dual enrollment," is assumed, especially on the part of those long interested in this subject. Even so, the reader should be able to follow my argument without such familiarity, especially if he should read first the material reproduced in Appendix I and in Appendix II, below. See, on "dual enrollment," the text at notes 30 and 45, below.

What the law has been said by the Court to be in these matters is indicated in the materials cited in notes 11, 15, 17, 22, 28, 106, 164, below. See, on the Title I programs, note 6, above. See, among many discussions of "church and state" problems in the United States, (1) Walter Berns, The First Amendment and the Future of American Democracy (New York: Basic Books, 1976); (2) Paul Blanshard, American Freedom and Catholic Power (Boston: Beacon Press, 1949); (3) Virgil C. Blum, Freedom in Education: Federal Aid for ALL Children (Garden City: Doubleday, 1965); (4) William Clancy, et al., Religion and American Society (Santa Barbara: Center for the Study of Democratic Institutions, 1961); (5) John Cogley, ed., Religion in America (New York: Meridian Books, 1958); (6) Robert F. Drinan, Religion, the Courts, and Public Policy (New York: McGraw Hill, 1963); (7) Sidney Hook, Religion in a Free Society (Lincoln: Univ. Nebraska Press, 1967); (8) Mark D. Howe, The Garden and the Wilderness: Religion and Government in American Constitutional History (Chicago: Univ. Chicago Press, 1965); (9) Wilber G. Katz, Religion and American Constitutions (Evanston: Northwestern Univ. Press, 1964); (10) Paul G. Kauper, Religion and the Constitution (Baton Rouge: Louisiana State Univ. Press, 1964) (also, 1972 Wisconsin L. Rev. 961); (11) Willmoore Kendall, Contra Mundum (New Rochelle: Arlington House, 1971); (12) Jerome G. Kerwin, Catholic Viewpoint on Church and State (Garden City: Doubleday, 1960); (13) Philip B. Kurland, Religion and the Law: Of Church and State in the Supreme Court (Chicago: Aldine Pub. Co., 1961); (14) Kurland, ed., Church and State: The Supreme Court and the First Amendment (Chicago: Univ. Chicago Press, 1975); (15) Martin A. Larson, When Parochial Schools Close: A Study in Educational Financing (Washington: Robert B. Luce, Inc., 1972); (16) David Lowenthal, "Connecting Religion and Government Constitutionally: A Case for Incomplete Separation," The Alternative: An American Spectator, May 1977, p. 18; (17) Alexander Meiklejohn, "Educational Cooperation Between Church and State," 14 Law and Contemporary Problems 61 (1949); (18) Robert Michaelson, Piety in the Public School: Trends and

Issues in the Relationship Between Religion and the Public School in the United States (New York: Macmillan, 1970); (19) Robert T. Miller and Ronald B. Flowers, ed., Toward Benevolent Neutrality: Church, State, and the Supreme Court (Waco: Baylor Univ. Press, 1977); (20) William Lee Miller et al., Religion and the Free Society (New York: Fund for the Republic, 1958); (21) Edmund S. Morgan, Roger Williams: The Church and the State (New York: Harcourt, Brace & World, 1967); (22) John Courtney Murray, The Problem of Religious Freedom (Westminster: Newman Press, 1965) (also, note 154, below); (23) Dallin H. Oaks, ed., The Wall Between Church and State (Chicago: Univ. Chicago Press, 1963); (24) Madalyn Murray O'Hair, Freedom Under Seige: The Impact of Organized Religion on Your Liberty and Your Pocketbook (Los Angeles: J. P. Tarcher, 1974); (25) J. M. O'Neill, Religion and Education Under the Constitution (New York: Harper & Brothers, 1949); (26) Leo Pfeffer, Church, State and Freedom (Boston: Beacon Press, 1967; rev. ed.); (27) Thomas G. Sanders, Protestant Concepts of Church and State (New York: Holt, Rinehart and Winston, 1964); (28) Thomas B. Schrock, Book Review: Howe, The Garden and the Wilderness, 62 Am. Pol. Sci. Rev. 597 (1968); (29) Raleigh W. Smith, Jr., "The American Civil Religion and the First Amendment," in Stephen L. Wasby, ed., Civil Liberties: Policy and Policy Making (Lexington: D. C. Heath and Co., 1976); (30) Laurence H. Tribe, American Constitutional Law (Mineola: Foundation Press, 1978); (31) E. G. West, Nonpublic School Aid: The Law, Economics, and Politics of American Education (Lexington: D. C. Heath, 1976); (32) Garry Wills, Politics and Catholic Freedom (Chicago: Henry Regnery Co., 1964); (33) Leo Strauss, Natural Right and History (Chicago: University of Chicago Press, 1953). See, also, note 7, above, note 115, 131, below.

11. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973). The quotation in the text is taken from Gerald Gunther,

Cases and Materials on Constitutional Law (Mineola, N.Y.: Foundation Press, 1975; 9th ed.), p. 1499. The second quotation within the quotation is taken from Justice Powell's Opinion for the Court in Nyquist, 413 U.S. 756, 785 (1973). Justice Powell observes that these "ingenious plans" "abundantly support the wisdom of Mr. Justice Black's prophecy" in Allen that "state or federal government funds /would be sought/ to buy property on which to erect religious school buildings or to erect the buildings themselves, to pay the salaries of the religious school teachers, and finally to have the sectarian religious groups cease to rely on voluntary contributions of members of their sects while waiting for the Government of pick up all the bills for the religious schools." Justice Powell draws here on Justice Black's dissenting opinion in Board of Education v. Allen, 392 U.S. 236, 253 (1968). See note 22, below, and the text at note 46, below. (I refer to particular justices because they reflect various attitudes which can be expected to ^{survive} changes in Court personnel. See note 163, below.)

A great favorite with the Court is Lane v. Wilson, 307 U. S. 268, 275 (1939), with its observation, "The /Fifteenth/ Amendment nullifies sophisticated as well as simple-minded modes of discrimination."

12. Wolman v. Walter, 433 U.S. 229, 242 (1977); Lemon v. Kurtzman, 403 U.S. 602, 616-617 (1971); Meek v. Pittenger, 421 U.S. 349 (1975). (Citations to Everson and to Allen may be found in notes 10 and 11, above. All references simply to Lemon in this memorandum will be to the 1971 Lemon case.) The quotations drawn upon in Wolman from Lemon reads, "Our decisions from Everson to Allen have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."

See the text at note 15, below.

The memorandum cited in note 7, above (and reproduced in Appendix II, below), discusses the doings of the Court in Wolman with a view to what is to come.

13. Wolman v. Walter, 433 U.S. 229, 246, n. 13 (1977).

Running through my argument in this memorandum, on the other hand, is the proposition that the public should be "involved" with "the day-to-day curriculum of the parochial school"—if we are to have a community. See, e.g., pages 31-34, below; also, note 92, below.

See, on the "on-site, off-site" problem, note 166, below. See, also, Appendix I, below.

14. The quotations are from Wolman v. Walter, 433 U.S. 229, at 248, 241-242; 242 (1977).

15. Norman Dorsen et al., Political and Civil Rights in the United States (Boston: Little, Brown and Co., 1976; 4th ed.), I, 1205. See note 12, above.

16. Board of Education v. Allen, 392 U.S. 236, 243 (1968) (emphasis added). "Although the books loaned are those required by the parochial school for use in specific courses," it should be noticed, "each book loaned must be approved by the public school authorities; only secular books may receive approval." Ibid., at 244-245.

It is important, in distinguishing Title I programs from the State programs which have faced difficulties on "establishment" grounds, to notice that the Title I programs are for all children in a geographical district, not primarily for children in church-sponsored schools. See, for example, Everson v. Board of Education, 330 U.S. 1, 20-21 (Justice Jackson, dissenting), 62 (Justice Rutledge, dissenting) (1947); Abington School District v. Schempp, 374 U.S. 203, 301-302 (Justice Brennan,

concurring) (1963) (note 41, below); Board of Education v. Allen, 392 U.S. 236, 252 (Justice Black, dissenting) (1968); Committee v. Nyquist, 413 U.S. 756, 768, 774-775 (1973); Meek v. Pittenger, 421 U.S. 349, 364-365 (1975). See, also, Katz, Religion and American Constitutions, pp. 102-103. See, as well, pages 20, 60-61, 65-66, above, and note 9, above, note 157, below.

It should be noticed that the question whether "all" students in a district are benefitted is different, for constitutional purposes under the Court's current doctrines, from the question whether a benefit provided students in church-sponsored schools is to be considered "educational" or "welfare."

17. Paul A. Freund, "Public Aid to Parochial Schools," 82 Harvard L. Rev. 1680, 1683 (1969).

18. Dorsen et al., Political and Civil Rights in the United States, I, 1206. Some questioning of Allen, and even of Everson, may be found as well in Wolman, 433 U.S., 256-259, 262 (1977). See note 22, below.

19. Dorsen et al., Political and Civil Rights in the United States, I, 1224.

20. Levitt v. Committee for Public Education & Religious Liberty, 413 U.S. 472, 481 (1973). See note 155, below.

21. Everson v. Board of Education, 330 U.S. 1, 49 (1947). The other dissenters in Everson were Justices Jackson, Frankfurter and Burton. I quote from Justice Jackson's dissent in the text at note 66, below.

22. Engel v. Vitale, 370 U.S. 421, 443 (1962) (concurring opinion). See, also, Wheeler v. Barrera, 417 U.S. 402, 432, n. 2 (1974) (Appendix I, below).

Justice Marshall, too, has recently raised a question about the continuing validity of Everson. Wolman v. Walter, 433 U.S. 229, 257 (1977). Justice Marshall

suggested on that occasion that Board of Education v. Allen, 392 U.S. 236 (1968) be overruled:

By overruling Allen, we would free ourselves to draw a line between acceptable and unacceptable forms of aid that would be both capable of consistent application and responsive to the concerns discussed above. That line, I believe, should be placed between general welfare programs that serve children in sectarian schools because the schools happen to be a convenient place to reach the programs' target populations and programs of educational assistance. //Note 4: This is the line advocated by Justice Black, dissenting in Board of Education v. Allen, 392 U.S., at 250-254. Justice Black was the author of the Court's opinion in Everson v. Board of Education, 330 U.S. 1 (1947), on which the opinion in Allen was based.// General welfare programs, in contrast to programs of educational assistance, do not provide "a substantial aid to the educational function" of schools, whether secular or sectarian, and therefore do not provide the kind of assistance to the religious mission of sectarian schools we found impermissible in Meek. Moreover, because general welfare programs do not assist the sectarian functions of denominational schools, there is no reason to expect that political disputes over the merits of those programs will divide the public along religious lines.

Wolman v. Walter, 433 U.S. 229, 259-260 (1977). See note 11, above, the text at note 46, below, and note 168, below. See, also, pages 69-71, above.

Consider, also, Justice Stevens' opinion in Wolman v. Walter, 433 U.S. 229, 266 (1977):

This Court's efforts to improve on the Everson text /"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Everson v. Board of Education, 330 U.S. 1, 16 (1947)./ have not proved successful. "Corrosive precedents" have left us without firm principles on which to decide these cases. As this case demonstrates, the States have been encouraged to search for new ways of achieving forbidden ends. See Committee for Public Education v. Nyquist, 413 U.S. 756, 785, 797. What should be a "high and impregnable" wall between church and state, has been reduced to a "blurred, indistinct, and variable barrier". The result has been, as Clarence Darrow predicted, harm to "both the public and the religion that /this aid/ would pretend to serve."

See, for more of "the Everson test," the text at note 123, below.

23. Wolman v. Walter, 433 U.S. 229, 247 (1977). Such locations may include mobile units, even if used only by church-sponsored schools. Ibid., at 247, n. 14. See notes 24, 25, below.

24. See Dorsen et al., Political and Civil Rights in the United States, I, 1228. See note 23, above, and the text at note 45, below. See, also, Appendix I, page 64, below. See, as well, Americans United v. Paire, 359 F. Supp. 505 (D.N.H., 1973); Thomas v. Schmidt, 397 F. Supp. 203 (D.R.I., 1975); affirmed, 539 F.2d 701 (1st Cir., 1976).

25. No doubt these programs will continue with appropriate adjustments, even if at the cost of pedagogical efficiency, if the Court should restrict to off-site locations the provision of certain services to these children. But I argue in this memorandum that the on-site, off-site distinction is not required by the Constitution. See Appendix I, below. See, also, note 166, below.

Public school employees who do not want to be sent into parochial schools to provide Title I remedial services may raise a Free Exercise, rather than an Establishment, objection. But these tend to be employees who are volunteers. See notes 81, 164, below.

26. "Consider the sensibleness of permitting students to waive access to the letters of recommendation they request of their teachers. Do not schools tend to be less selfish and more reliable than credit agencies in passing judgment on the young?" Anastaplo, "The Public Interest in Privacy: On Becoming and Being Human," 26 DePaul L. Rev. 767, 776, n. 13 (1977). The quotations from the Black dissent in Allen may be found in 392 U.S., at 252, 253-254.

27. "The critical factors . . . , as in the Everson /bus fares/ reimbursement system, are that the school has no control over the expenditures of the funds and the effect of the expenditure is unrelated to the content of the education provided." Since teachers select the trips to be made and decide what is to be emphasized in the course of such trips, "an unacceptable risk of fostering of religion is an inevitable byproduct." Wolman v. Walter, 433 U.S. 229, 253-254 (1977). See page 71, above, note 105, below.

28. Richard E. Morgan, "The Establishment Clause and Sectarian Schools: A Final Installment?" 1973 Supreme Court Review 57, 82. The question remains, of course, whether public funds have to be used "in any major amount to increase the economic distress of church-related schools."

Mr. Morgan's article, which perhaps saw matters to be clearer than they have turned out to be, followed upon Levitt v. Committee, 413 U.S. 472 (1973), Committee v. Nyquist, 413 U.S. 756 (1973), and Sloan v. Lemon, 413 U.S. 825 (1973). But see notes 163, 164, below. See, also, note 11, above, notes 30, 31, below. (I have found the Morgan article to be most useful.)

29. Morgan, "The Establishment Clause and Sectarian Schools," 1973 Supreme Court Review 57, 93.

30. Samuel Rabinove, "Does 'Dual Enrollment' Violate the First Amendment?" 3 Journal of Law & Education 129, 131-132 (1974). The cases which prompted his suggestions were Levitt v. Committee for Public Education, 413 U.S. 472 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). The measures here suggested are directed particularly to the danger of "excessive entanglement." (See the text at note 105, below.) They bear upon the "on-site" problem. See the text at note 45, below. See, also, note 166, below.

31. More modest programs can safely be somewhat more ingenious. Thus, one small Roman Catholic high school for girls in Chicago has made arrangements whereby classes go regularly to a local public park for gym, where a public employee is waiting to run a program for anyone who comes. A police car always escorts the classes through a dangerous neighborhood.

Thus, also, a Roman Catholic high school (also in the Chicago area) has a local community college send an instructor in regularly to conduct a course

for thirty students, just as the college sends instructors to other institutions (such as banks). The credit is recorded at the college; tuition is paid to the college; the high school pays for heat, lights, etc.

32. If all the poor and educationally needy children in a district should be in the private schools and the better students should be in the public schools of the district, then the private schools of that district would not be eligible for Title I services. This is further complicated by the different inclinations among ethnic groups about "going on welfare" or otherwise identifying themselves (in accordance with Title I criteria) as eligible for Title I funds.

I have heard estimates that private school children get from the Federal Government less than one-fifth of what they are entitled to from the Federal education budget. Consider, also, the "Interim Report" cited in note 5, above, which includes, at p. 565, this finding,

The extent to which Title I serves non-public school students without bias has improved as the program has matured. Nevertheless there is need for improvements. We estimate the program reaches only 47% of the non-public school students who should be eligible for it, and provides them with only about 18% of the services they should receive. In most LEAs children with the same level of educational disadvantage have less chance of receiving Title I services if they are enrolled in private schools, and will receive fewer and poorer services.

33. A precedent is sometimes seen in the church-sponsored mission schools "supported" for many years by the Bureau of Indian Affairs. Compare the opinion of Justice Brennan, Abington School District v. Schempp, 374 U.S. 203, 246-247 (1963).

Consider, also, the public funds routinely made available, as in the State of Illinois, for church-sponsored homes and training facilities for delinquent, troubled or other children. See Cook County v. Chicago Industrial School for Girls, 125 Ill. 540, 18 N.E. 183 (1888); Dunn v. Chicago Industrial School for Girls, 280 Ill. 613, 117 N.E. 735 (1917); Trost v. Ketteler Manual Training

School, 282 Ill. 504, 118 N.E. 743 (1918); St. Hedwig's School v. Cook County, 289 Ill. 432, 124 N.E. 629 (1919). See, also, Reichwald v. Catholic Bishop of Chicago, 258 Ill. 44, 101 N.E. 266 (1913); People ex rel. Lattimer v. Board of Education, 394 Ill. 228, 68 N.E. 2d 305 (1946). (See note 98, below, for the source of these citations.) See, as well, Chicago Tribune, Dec. 22, 1977, sec. 3, p. 1.

34. The other is St. Ignatius, a high class school, which is adjacent to the University of Illinois Chicago Circle campus and which draws many of its students from outside the neighborhood, including from the suburbs. See Chicago Magazine, May 1978, p. 143. It seems a far better school than St. Mel's.

Providence-St. Mel students do not participate in the Title I programs, since those programs have been limited, in practice, to elementary schools.

35. What if it should be argued that a church-sponsored school is at least entitled to public support for that proportion of its student body not belonging to the faith involved? Would that, too, be regarded as improper, in that it would be a different kind of intrusion by the State into the religious affiliations and hence life of the people? See notes 78, 147, below.

36. Providence-St. Mel High School has weathered a crisis since the preceding draft of this memorandum was prepared (in January 1968). Its closing was announced in April 1968 by the harassed Archdiocese of Chicago. Efforts to save it are reflected in this report from the Chicago Tribune, July 2, 1978, sec. 1, p. 3 ("Independent St. Mel's plans Sept. 5 opening"):

Classes will begin on Sept. 5 at Providence-St. Mel High School, which had been threatened with extinction last spring, the chairman of the new board of directors announced Saturday. . . . Although only 40 per cent of the students in the school are Catholics, and no more than half of the board is Catholic, and the Chicago archdiocese has offered no assistance, the school will continue to "teach Catholic secondary education on the West Side of Chicago," the chairman said.

But troubles are not over for the much-publicized school, he said. It is still \$180,000 short of meeting its projected \$490,000 operating and insurance costs for the year He also announced that the board has purchased the school building . . . from the Sisters of Providence

The announcements came 10 hours after the school legally severed its ties with the archdiocese, which announced last spring that it was closing the school because it was too expensive to operate Hope that the only Catholic high school on the West Side would remain open began last spring when a full-page ad appeared in the Wall Street Journal pleading for financial assistance.

The ad described the school's predicament and its recent success in an economically depressed neighborhood, especially among its black students, most of whom go on to college. Although /the chairman/ criticized the archdiocese last spring for "abandoning" the West Side, he had praise Saturday for its education system. "Although today is a new beginning in a sense," he said, "it is also a continuation of a very long tradition of Catholic education in this community."

A letter to the editor (Chicago Tribune, June 23, 1978, sec. 5, p. 2) suggests the difficulties that must be dealt with by conscientious bishops:

Andrew Greeley's June 13 column regarding Providence—St. Mel High School illustrates his total lack of balance sheet knowledge By what right does Greeley think he can speak for the Catholic people of the archdiocese? He certainly does not speak for me. Contrary to what Greeley says in his article, the Catholic people are not willing to keep open schools in which the population is overwhelmingly non-Catholic.

See note 149, below.

37. Thus, it was argued in the course of the released-time controversy that the Roman Catholic critics of the Court were much more concerned about public funding for their schools than about released-time arrangements. McCollum v. Board of Education, 333 U.S. 203 (1948) and the dicta in the Everson bus case (see the text at note 123, below) were perceived by Roman Catholics, it was argued, as barriers to the desired public funding. See Paul Blanshard, "Postlude: The Battle Continues," in Vashti Cromwell McCollum, One Woman's Fight (Boston: Beacon Press, 1961), p. 203.

No doubt some would also argue today that Roman Catholic involvement with non-Catholics in inner-city schools is primarily a way of arousing public

sympathy with a view to making a decisive breakthrough with respect to public funding which would eventually permit parochial schools to flourish again as bastions of the faith. See the text at note 66, below. But see the concluding paragraph of this memorandum at page 52, above; also, note 115, below.

38. This was a question I was obliged to raise again and again during the 1960s about our participation in the Vietnam War. See Anastaplo, "Preliminary Reflections on the Pentagon Papers," University of Chicago Magazine, January/February, March/April, 1972 (reprinted in 118 Congressional Record S11560, July 24, 1972). See note 72, below.

39. One is reminded of the distorting effects on financial, other business and even family decisions of the progressive income tax. See Harry Kalven, Jr. and Walter J. Blum, The Uneasy Case for Progressive Taxation (Chicago: University of Chicago Press, 1953). See note 168, below.

40. It seems likely that private schools could hire themselves better services, cheaper, than the public schools can provide them—and with less adverse effect on the pay scales of private schools. Certainly, one should not ignore the influences on at least the morale of private school teachers of the much better paid public school teachers who come among them to render services similar to those the private school teachers routinely provide. Even so, the disruptions caused by bringing public school teachers in are probably less than those caused by taking private school students out.

Among the financial differences between public and private schools are the following: "School board officials said the starting pay for Roman Catholic teachers is about 80 per cent of the prevailing public-school rate in the Chicago area." Chicago Sun-Times, February 7, 1978, p. 7. "Public schools in Illinois

spend about nine times as much for administration as Roman Catholic schools and Chicago public schools have 11 times as many administrators as parochial schools, the Illinois Public Action Council said Saturday. If the public schools were operated as efficiently as the parochial schools, some \$30.5 million would be freed for new programs, reduced class size or could be used to reduce taxes, the group said." Chicago Sun-Times, November 2, 1975, p. 1.

In any event, something is to be said, if certain forms are insisted upon, for allowing public schools to lease rooms in private schools for the purpose of providing Title I services. See note 24, above.

41. See note 156, below. The constitutionality of a comprehensive voucher system (in which church-sponsored elementary and secondary schools would share) remains to be tested. States have been stopped from paying money directly to church-sponsored schools or from paying money to or providing tax credits for the parents of such schools. Wolman v. Walter, 433 U.S. 229, 250-251 (1977); Committee v. Nyquist, 413 U.S. 756, 783 (1973); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

It has been noticed that true educational voucher plans (in which public schools participate and from which they would derive all or most of their funds) have not yet been attempted on a large scale. See Morgan, "The Establishment Clause and Sectarian Schools," 1973 Supreme Court Review 57, 69, n. 57. And it has been asked, "Could the universality of participation in a true voucher scheme alter, for Mr. Justice Powell or any moderately-separationist successor, the fact that substantial benefits would result to the church-related schools?" Ibid., p. 91. A negative answer seems to be suggested by this commentator. Ibid., pp. 91-93.

But consider the following observation by Justice Brennan, a strict separationist, in his concurring opinion in School District of Abington v. Schempp,

374 U.S. 203; 301-302 (1963):

Nothing we hold today questions the propriety of certain tax deductions or exemptions which incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations. If religious institutions benefit, it is in spite of rather than because of their religious character. For religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups. There is no indication that taxing authorities have used such benefits in any way to subsidize worship or foster belief in God. And as among religious beneficiaries, the tax exemption or deduction can be truly nondiscriminatory, available on equal terms to small as well as large religious bodies, to popular and unpopular sects, and to those organizations which reject as well as those which accept a belief in God.

Cannot the same be said about the propriety of public support of educational activities wherever they may be carried on? See note 16, above.

42. It remains a subject of considerable speculation what a universal voucher system, with full freedom of choice for all parents, would do to our public schools. No doubt, parents alert to educational concerns would be able in some instances to improve the education available to their children. Would education as a whole thereby be elevated? Or would the remaining "public" schools (that is, the government-organized schools that would probably have to continue to be made available to the large body of families) be made even worse? The more interested families would be gone as well as the better students. That would mean that the public schools, or their successors, would have to deal with poorer students than they have now (with a bad effect on most teachers, who get considerable satisfaction and encouragement out of watching their occasional good student progress and prosper). See note 155, below. Other dire consequences can be conjured up. See note 143, below.

See, on vouchers generally, Adam Smith, The Wealth of Nations (New York: Modern Library, 1937), pp. 716f, 740f. See, also, Plato, Sophist.

43. There are arguments to be heard as well about the harmful effects upon private schools of any public or outside (including diocesan) funds.

Some independent priests believe that their parish schools would not do as well as they do if they should become dependent on funds supplied in large part from outside their parishes. (Some believe, for example, that their people need practice in being on their own, that it is too easy to become "public slaves.") Even so, private schools can elect not to participate in any enterprise which threatens their integrity.

Thus, if government money leads to too much government supervision of church-sponsored schools, the churches should be able to pull out. Or the public, seeing what is happening, can decide against making additional public funds available. That is, repeated adjustments can be made—so long as there is true freedom of choice and so long as the money is not controlled by arbitrary court-imposed restrictions. Generally, it still seems, church-sponsored schools are willing to run risks in receiving what they consider their fair share of public funds. See notes 164, 169, below.

44. In any event, we have here a key question of fact. "Since most constitutional cases turn on 'legislative' facts that are difficult to prove, whether or not a court takes judicial notice of those facts will often be pivotal." Dorsen et al., Political and Civil Rights in the United States, I, 1205. See note 7, above, note 169, below; also, p. 6, above.

45. Ibid., I, 1227. See, also, the text at notes 23, 24 and 30, above.

46. Morgan, "The Establishment Clause and Sectarian Schools," 1973 Supreme Court Rev. 57, 59. See Board of Education v. Allen, 392 U.S. 236, 253-255 (1968). See, also, notes 11, 22, above.

47. Lemon v. Kurtzman, 403 U.S. 602, 630 (1971). The unacknowledged intentions of various members of the public bodies authorizing funds for "sectarian schools" should not concern us, so long as a plausible public purpose is presented in justification of disbursements. See note 52, below.

48. Even the libertarian Justice Black considered school discipline important—and inveighed against the permissiveness resulting from the Court's opinions. See Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 515 (1969) (dissenting).

49. The legitimate public interest in morality is suggested in a survivor's observation that in the Nazi concentration camps, "those who had strong religious and moral convictions managed life there much better than the rest." New Yorker, August 2, 1976, p. 44.

The First Amendment should not be understood to prohibit activities which might have a considerable, but in principle incidental, effect on the preservation or advancement of religion.

50. Do not all, or at least most, religious opinions among us share certain moral precepts?

One stood to recite before my high school principal (in a public high school, in Southern Illinois); one routinely stood up for a teacher in a Roman Catholic parochial school, I am told. Are not these among the attitudes the public could well support without having to believe that the primary purpose of such support is to "establish" some religion?

See, on my principal, Anastaplo, "A new look at an old lesson," Chicago Tribune, June 12, 1976, sec. 1, p. 10. See, on the discipline in Roman Catholic schools today, Patrick J. Buchanan, "Today's lesson is about a successful school," Chicago Tribune, January 1, 1978, sec. 2, p. 6; Nick Timmesch, "Parochial schools' success 'secret': discipline and work," Chicago Tribune, January 6, 1978, sec. 3, p. 2.

51. Morgan, "The Establishment Clause and Sectarian Schools," 1973 Supreme Court Review 57, 67.

52. Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930); Abington School District v. Schempp, 374 U.S. 203, 248 (1963).

53. But what should be permitted to be done (or to be financed) in advancing morality? The Pennsylvania Superintendent of Public Instruction saw Bible reading in public schools as providing "one of the last vestiges of moral value that we have left in our school system." Abington School District v. Schempp, 374 U.S. 203, 278-279 (1963). Does the use of such reading, in a devotional sense, raise serious problems not with respect to an establishment of religion but only with respect to the free exercise of religion?

Justice Brennan, in his Schempp concurring opinion, 374 U.S., at 281, argued, "It has not been shown that readings from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation of the Pledge of Allegiance, or even the observance of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government." See, also, ibid., at 293-294; Lemon v. Kurtzman, 403 U.S. 602, 610 (1971) (on the status of Latin, Hebrew, classical Greek and "morals").

The argument has been made, with some evidence in its support, that the moral training available in church-sponsored schools is often superior to that usually provided by public schools. On the other hand, some citizens are understandably concerned about the tyrannical disciplinary methods and intellectually stultifying dogmatism to which church-sponsored have sometimes resorted. See the references to Augustine in Anastaplo, "The Public Interest in Privacy," 26 DePaul L. Rev. 767, 785, n. 33 (1977). See note 97, below.

Be all this as it may, it certainly is not conducive to morality for public officials (including judges) either to appear hostile to schools pervaded by a sense of moral dedication or to be less than scrupulous about the moral undertakings of the community. Consider the attempt of the New York legislature, frustrated by the Supreme Court of the United States in 1977, to discharge what the legislature called "a moral obligation" by paying the church-sponsored schools of that State the money they had been promised by and had expected from State programs subsequently declared invalid by the Court. State Academy of New York v. Cathedral, 434 U.S. 125, 127 (1977). Compare Lemon v. Kurtzman, 411 U.S. 192 (1973); 46 U.S.L.W. 1091 (1977). Consider, also, Justice Rutledge's implicit assumption, in Everson v. Board of Education, 330 U.S. 1, 58, that there is a conflict (in what parochial school parents pay and receive) between justice and religious liberty. See notes 85, 156, below.

54. See, e.g. Walz v. Tax Commission of the City of New York, 397 U.S. 664, 671 (1970); the text at note 66, below.

55. See, e.g., Paul Blanshard, American Freedom and Catholic Power (Boston: Beacon Press, 1949), p. 65.

56. Thus, at Rosary College (where I have taught for a decade, while continuing to teach at The University of Chicago), academic discussions, even among the nuns on the faculty (to say nothing of the students themselves), have been strikingly free of religious dogmas or ecclesiastical discipline. Malcolm P. Sharp, Professor of Law Emeritus, The University of Chicago, who has been teaching at Rosary for several years now, has publicly observed that he never felt the least restraint in anything he wanted to say in class at Rosary (even with respect to abortion or the immortality of the soul). The controversies at Rosary College do tend to be the conventional ones of the day. See, e.g., Anastaplo, The Constitutionalist, p. 324.

The Court has considered public aid to church-sponsored colleges and universities to have raised different questions, with respect to establishment problems, from public aid to church-sponsored elementary and secondary schools. See, e.g., Tilton v. Richardson, 403 U.S. 672 (1971) (page 61, above); Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976).

I suspect, however, that if public aid should come to be routinely provided in support of the secular teaching necessarily provided in church-sponsored elementary and secondary schools, the Court would become (would have become?) as relaxed about such aid as it now is about public aid to church-sponsored colleges and universities. See note 164, below.

In any event, a teacher at Rosary College cannot easily distinguish between ^{still} what happens in the classroom there, in classes/made up in large part of youngsters who have been in parochial schools all their lives, from what goes on in other good colleges. Students at Rosary have told me, in response to my inquiries, that they cannot determine from what they hear said in class whether their classmates have been through parochial schools--except that if someone is openly critical of religion or of the Pope, then it is probable that that student is a "product" of the parochial school system.

57. This is explicitly recognized by the Amish who have defied State school codes. See, e.g., Yoder v. Wisconsin, 406 U.S. 205 (1972). (See, also, Sherbert v. Verner, 374 U.S. 398 [1963/].) But it is not only the Amish who can be threatened by an unfettered secondary education. Russian Marxism also seems to be challenged by it; so may be a certain kind of Roman Catholicism. See note 53, above, note 97, below. See, also, note 115, below.

Indeed, does not the education required by State laws in this country, no matter where it is provided, tend to undermine the old-fashioned religious faith? What, for example, is the effect of "examinations of" (not necessarily "teaching of") evolution?

In effect, then, the religious organizations which sponsor schools can be understood to be doing far more to "defend" themselves than to advance (to say nothing of "establishing") their religion.

58. Bradfield v. Roberts, 175 U.S. 291 (1899). See Tilton v. Richardson, 403 U.S. 672, 680 (1971); Lemon v. Kurtzman, 403 U.S. 602, 634 (1971). See, also, Chicago Tribune, July 25, 1978, sec. 1, p. 9:

The federal government has rescinded an order that church-run hospital chains return millions of dollars in Medicare payments for services rendered by unsalaried staff. The order, issued last October and fought by the Catholic Hospital Association, was rescinded this month by the Health Care Financing Administration of /HEW/. Last October's order primarily affected hospital chains run by religious orders that have centralized accounting services employing religious workers who have taken a vow of poverty. Because of such vows, these workers are paid only in room and board, but the chains bill Medicare for the full value of their services. . . . About 18 religious orders in Illinois would have been affected. . . .

59. Engel v. Vitale, 370 U.S. 421, 437, n. 1. (1962). This was anticipated by Torcaso v. Watkins, 367 U.S. 488 (1961).

60. Everson v. Board of Education, 330 U.S. 1, 14 (1947); Blanshard, American Freedom and Catholic Power, pp. 89-91.

61. Justice Douglas (concurring), Lemon v. Kurtzman, 403 U.S. 602, 633 (1971).

62. Consider, for example, the significance of the healing miracles in the Christian gospels and of the medical advances held out by Descartes' new science. See Anastaplo, "On Death and Dying," in Human Being and Citizen (note 7, above).

Even so, "the courts have sustained government prohibitions on handling venomous snakes or drinking poison, even as part of a religious ceremony" (citing the Swann and Masey cases found in note 74, below). McDaniel v. Paty, 46 U.S.L.W. 4329, 4332, n. 8 (1978).

63. Lemon v. Kurtzman, 403 U.S. 602, 630 (1971). Justice Douglas adds, at this place in his concurring opinion, "—as if that were enough to justify violating the Establishment Clause."

64. Board of Education v. Allen, 392 U.S. 236, 247 (1968).

65. No doubt, aid to such schools can help them stay open, at least for awhile. (It is also possible, of course, that too much reliance on public funds can undermine such schools—a consideration to be taken into account by the responsible public as well as by supporters of these schools. See note 43, above, note 165, below.)

It has been noticed that the Court "has never held that freeing private funds for sectarian uses 'invalidates otherwise secular aid to religious institutions.'" New York v. Cathedral Academy, 434 U.S. 125, 134 (1977). Still, it should be emphasized, with a view to constitutional litigation, that Title I expenditures cannot replace funds that would otherwise be budgeted by the recipient schools. See the text at note 5, above; also, Appendix I, page 61, above. See, as well, note 87, below.

66. Everson v. Board of Education, 330 U.S. 1, 24 (1947). I am sure that our Roman Catholic friends of a theological turn of mind would dissent from Justice Jackson's identification of "the rock on which the whole structure rests." See, e.g., Matthew 16: 18-19. Consider, also, the significance of the following news report:

The Rev. H. Robert Clark, superintendent of schools for the Catholic Archdiocese of Chicago, has resigned, it was learned Wednesday. Father Clark, 51, who has headed the area's Catholic schools since 1968, probably will return to work as a parish priest, Msgr. Francis Brackin, vicar general of the archdiocese, said. Father Clark told John Cardinal Cody of his decision last Thursday.

"The daily grind kind of got to him after more than nine years," Msgr. Brackin said. "He probably will take another parish. After all, it is our goal and mission as priests to work directly with souls."

Chicago Tribune, January 5, 1978, sec. 3, p. 7 (emphasis added). That is, education and "work/ing/ directly with souls" seem to be quite different activities?

67. Abington School District v. Schempp, 374 U.S. 203, 229 (1963) (concurring opinion).

68. Meek v. Pittenger, 421 U.S. 349, 366 (1975). The quotation from Justice Brennan may be found in Lemon v. Kurtzman, 403 U.S. 602, 657 (1971). (This passage from Justice Stewart is reproduced by Justice Blackmun, in his opinion for the Court in Wolman v. Walter, 433 U.S. 229, 249-250 (1977).)

69. Meek v. Pittenger, 421 U.S. 349, 366 (1975). See, also, Wolman v. Walter, 433 U.S. 229, 248-251 (1977).

70. Lemon v. Kurtzman, 403 U.S. 602, 628 (1971) (concurring opinion by Justice Douglas).

71. Ibid., at 641.

72. See Anastaplo, The Constitutionalist. See, also, note 75, below. Of course, criticism of Communist Party prosecutions was quite limited, since few cared about what happened to American Communists (perhaps even fewer than those who sensed the distorting effects on our foreign policy resulting from our domestic aberrations). See note 38, above, ^{note 131, below.} But significant numbers of our fellow citizens have cared about church-sponsored schools and about a reading of the Constitution

which seems to preclude sensible public support for such schools. See, e.g., notes 156, 163, below. Indeed, many have even been moved thereby to wonder what it means to say that the Court "speaks as the voice of the Constitution." See note 98, below. Compare Anastaplo, The Constitutionalist, pp. 431, 499, 583-584, 806; "The Public Interest in Privacy," 26 DePaul L. Rev. 767, 791, n. 46 (1977).

73. See United States v. Reynolds, 98 U.S. 145 (1878); Prince v. Massachusetts, 321 U.S. 158 (1944). In these matters, John Locke is quite useful. See note 131, below.

74. Compare People v. Woody, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P. 2d 813 (1964); Wisconsin v. Yoder, 406 U.S. 205 (1972); Walter Berns, The First Amendment and the Future of American Democracy (New York: Basic Books, 1976), pp. 27-29, 40-41, 42, 78. But see, Thomas L. Shaffer, Book Review: Walter Berns, The First Amendment, 40 Review of Politics 271, 273 (1978). See, also, State ex rel Swann v. Pack, Tenn., 527 S.W.2d 99 (1975), cert. denied, 424 U.S. 954 (1976); State v. Massey, 229 N.C. 734, 51 S.E.2d 170, appeal dismissed, 336 U.S. 942 (1949). See note 62, above.

75. See, e.g., Anastaplo, "The Occasions of Freedom of Speech," 5 Political Science Reviewer 383 (1975). See, also, note 115, below.

76. President John F. Kennedy, quoted by Justice Douglas in Tilton v. Richardson, 403 U.S. 672, 690 (1971). Justices White and Rehnquist, on the other hand, insist that it makes sense for a State to support the secular part of a child's education, wherever it is given. See Meek v. Pittenger, 421 U.S. 349, 395 (1975); Committee v. Nyquist, 413 U.S. 756, 814-815 (1973).

77. No doubt, some question will be raised by the conscientious about on-site delivery of the services provided to students in church-sponsored schools.

But it should also be evident from what I have said that there is no constitutional necessity for inefficiency and disruption. See Appendix I, below; also, note 166, below.

78. An even deeper problem with the Court's Establishment of Religion efforts over the years is one to which I have already alluded: the Court has considered itself obliged, empowered and qualified to consider the beliefs and intentions of those conducting the private schools to which public funds have been allocated. That is, the Court has been more "religious" (or doctrinaire) than political (or statesmanlike) in assessing what happens in and because of church-sponsored schools.

The court has been aware of this problem. Thus, it was observed in New York v. Cathedral Academy, 434 U.S. 125, 133 (1977), that we cannot have courts undertaking a "search for religious meaning in every classroom examination" Even so, it has intruded itself more and more into questions that it has no business fooling around with. See note 35, above, notes 134, 147, below.

79. See Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Irving Dilliard, "Hugo Black and the Importance of Freedom," 10 American University L. Rev. 7, 13-15 (1961). Is not Abington School District v. Schempp in the Gobitis-Engel line? See, e.g., 374 U.S. 203, 208, 308, n. 1 (1963). See, also, notes 102, 131, 169, below.

80. One is reminded of John Milton's tract, "A Treatise of Civil Power in Ecclesiastical Causes; Showing that it is not lawful for any civil power on earth to compel in matters of religion." Milton, Complete Poems and Prose,

ed. Merritt Y. Hughes (Indianapolis: Odyssey Press, 1957), p. 839. See, also, Ibid., pp. 676, 791-792, 869-870, 879, 895-896. See, also, note 10, above, notes 131, 169, below.

81. See, e.g., note 25, above. Indicative of these concerns is the elimination of sacrilege as an offense under American law. See, e.g., Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

82. Anastaplo, The Constitutionalist, pp. 508-509. Thus, religious liberty is intimately related to freedom of speech and of the press under the Constitution. Ibid., p. 672. See notes 126, 160; below.

83. Blanshard, American Freedom and Catholic Power, p. 74. It should be generally evident by now that Roman Catholics, whether or not products of parochial schools, are not less patriotic than the general run of the population in this country. The Roman Catholics' interest in liberty is seen, in effect, in their 1943 insistence that Federal aid to education (of which they want their fair share) should not be permitted to "interfere with local control of the purpose and processes of education." Ibid., p. 92. They had also indicated, in the same statement, that any Federal aid to education should "make mandatory the inclusion of Catholic schools in its benefits." Id.

84. Similar assessments can be made of tax exemptions for religious organizations or of draft exemptions for conscientious objectors. Such matters call for policy determinations, to be adjusted as circumstances change.

The rules might have to be changed, for example, if every household in town should be designated separate church buildings. See, for a spreading abuse,

"Tax-Exempt Property is Costing You More and More Money," Parade, February 13, 1977; "Upstate Assessor Backs Exemptions to Universal Life Church Ministers," New York Times, May 8, 1977, p. 26; "Citizens blessed with no tax: most are ministers," Chicago Tribune, June 12, 1977, sec. 1, p. 4; "Become a Minister, Set Up a Church, Avoid Taxes, 'Modesto Messiah' Urges," Wall Street Journal, July 13, 1977, p. 30; "'Church' has \$2 tax-cut plan for homeowners," Chicago Sun-Times, August 20, 1977, p. 7. On the other hand, have not Americans always "known" what constituted a "religion" for constitutional and legal purposes? See, e.g., The Twenty-third Psalm. See, also, United States v. Reynolds, 98 U.S. 145, 162f (1878); United States v. Kuch, 288 F. Supp. 439, 445 (D.D.C., 1968). Compare note 102, below.

It has been observed that the Court "has traditionally assumed that the exemption /of conscientious objectors from military service/ is a matter of legislative grace, is not compelled by the free exercise clause, and does not violate the establishment clause." Gunther, Cases and Materials on Constitutional Law, p. 1527. And it has been asked, "Do the modern interpretations of the religion clauses cast doubt on those assumptions?" Id. Consider, for example, Justice Harlan's naivete as recorded in the text at note 132, below. Compare Anastaplo, The Constitutionalist, pp. 40-41, 296-297; note 132, below.

In any event, do not tax and draft exemptions pay more respect to "religion," and encourage it more, than does limited public financial support by the public of church-sponsored schools?

See notes 85, 86, below.

85. See Immanuel Kant, Education (Ann Arbor: University of Michigan Press, 1966), p. 84: "/W/e should seek early to infuse into children ideas as to what is right and wrong." Kant can say this even though he seems to say

elsewhere that everyone, including children, knows everything needful about morality without the help of philosophers. See, also, the Augustine references in note 53, above.

Compare my argument for the "critical need among us to train properly the character as well as the understanding of the people of this country." Anastaplo, "Mr. Justice Black, His Generous Common Sense and the Bar Admission Cases," 9 Southwestern University Law Review 977, 983 (1977). Consider, also, Anastaplo, "Passion, Magnanimity and the Rule of Law," 50 Southern California Law Review 351, 369-372 (1977) (on "character and freedom"); "Natural Right and the American Lawyer", in Human Being and Citizen (which includes, at pp. 56-58, 255-256, my reservations about certain Roman Catholic distortions of the natural right tradition); notes 97, 121, below.

Consider, as well, the account in the ninth essay of my Human Being and Citizen volume of a decade-long "character and moral fitness" litigation which would have had a quite different outcome if the bloc of Roman Catholic bar commissioners involved had voted sensibly. Certainly, a sensible vote in that matter—rather than a vote distorted by Cold War fantasies about American "Communism"—would have honored the great Roman Catholic natural law tradition. See William J. Martin, 2 Loyola Law Times 8, 13 (1962).

The argument of this note is closely related to that in note 84, above, and to that in note 86, below.

86. These "deliberate decisions" affect how far one pushed constitutional arguments for or against any group's activities. See note 164, below. Thus, the great contributions that can be made by Roman Catholic doctrines to our natural right opinions are, in a dangerously relativistic age, to be encouraged and supported (whatever one may think of the theological presuppositions of

those doctrines). Indeed, if only for this reason, the schools sponsored by the Roman Catholic Church in this country should be considered a great national resource. See notes 97, 121, 156, below. Compare note 53, above.

Consider, in this respect, the balanced assessment of her church by Sister Candida Lund, President of Rosary College, in her essay, "Why I am Still a Catholic" (to be published, by Doubleday, in a collection, Still Catholic?):

. . . I regard the Catholic Church as a great, civilizing force helping to provide growth and order. It is an institution worthy of respect and regard—and of my allegiance. But as I write this I do not wish to appear uncritical. There are practices which I decry—not many, but some regrettable, perhaps even deplorable. Ronald Knox could not have been only jesting when he said that if one is going to travel on the barque of Peter, he better not look too closely into the engine room. Machiavellian politics have never been confined to the secular state, nor to Machiavelli's own century. From time to time, one finds in the Church sins of omission as well as co-mission, unnatural narrowness, and missed opportunities.

The Church's Janus-like approach troubles those who are not Catholics as well as some who are. As one who is not a Catholic, George Anastaplo wrote in his book, Human Being and Citizen: "Another instance that disturbs many good men today is the teaching of the Roman Catholic Church with respect to birth control. If its prohibition of certain means of birth control were regarded by the Church as is, say, a requirement that meat not be eaten on Friday, that would be one thing—and, indeed, some restraints could even be salutary in some places, or at some times, if only to induce human beings to reflect upon the natural order of things and the role of sexual activity in it. But when the teaching is insisted upon (with an effect on public policy) as a universal and unalterable dictate of natural law—which would be binding on all right-thinking men and women, not Roman Catholics alone—serious problems arise. . . . Thus the Roman Catholic teachers who have done so much to keep alive the natural law tradition among us may, by their evident disregard of considerations of prudence, be inhibiting others, in a world beset by unprecedented population growth, from taking that tradition seriously."

On the other hand, Professor Anastaplo credits the Church with important thinking on the morality of war. He writes, "But in another realm which has to do with deliberations about the prospects and conduct of another world war, Roman Catholic thinkers seem to be among the leaders bringing to bear on a new problem some old teachings. Even notorious Marxists have praised papal statements on this subject."

Professor Anastaplo's remarks carry a perverse compliment. They would not be made about an institution that lacked standing. . . . Because the Catholic Church is an institution capable of monumental impact for

good, decent men and women watch it with interest and concern. They look to it for standards. They do not wish to see it falter or fail to achieve the good possible.

When I say that one of the reasons I am still a Catholic is because I am helped by the Church's enunciation of its moral code, I am not implying that outside of the Catholic Church I would not be able to build a moral position. To hold this would be ludicrous.

Unquestionably, however, there would be for me greater obstacles if I tried alone to search for a moral code. The greatest difficulty in the search today results from the disrepute into which natural right has fallen. I doubt that most Catholics are aware of the battering natural right (or to use the more Catholic term, natural law) has suffered. . . .

Critics of the Roman Catholic Church abound, of course. Consider, for example, the passionate conclusion of David Hume's The Standard of Taste. Consider, also, John Dewey's characterization of the Church as "a powerful reactionary world organization." Blanshard, American Freedom and Catholic Power, p. 106. On the other hand, a much more sensible assessment of the Church may be found in Leo Strauss, What Is Political Philosophy? (Glencoe: The Free Press, 1959), pp. 281-286, 306-311. See, also, Anastaplo, The Constitutionalist, pp. 610-612; note 121, below. See, as well, Edmund Wilson, The Shores of Light (New York: Farrar, Straus and Young, 1952), pp. 436-439; James Joyce, A Portrait of the Artist as a Young Man (New York: Viking Press, 1956), p. 244. ("I said that I have lost the faith . . .").

See notes 84, 85, above.

87. It is far from clear to me, by the way, that church-sponsored schools benefit from Title I payments, in the sense that the availability of the payments is critical to whether they stay open. Of course, they do benefit in that their students benefit, thereby making such schools less unattractive than they might otherwise be. But the financial problems church-sponsored schools do have, it seems, are not directly affected by Title I payments,

which go to public institutions and public employees and hence do not permit private schools to save much (if at all) on services they otherwise have to provide. See note 65, above.

88. The problem of supervision, and hence "interference," presents itself whether or not there is public funding involved. But that problem does tend to become more acute when the government begins paying some of the bills (as our colleges and universities have learned in recent years). See note 169, below. Even so, it is generally recognized that States are already empowered to assess private schools not only for health and safety but also for the kind and quality of education they provide. That is, all schools in this country are to some extent public; none is fully private.

Consider how the problem of supervision appeared three decades ago to one determined critic of the Roman Catholic school system:

When Catholic writers discuss the virtues of the parochial-school system and point out that the taxpayers of the United States would have to pay \$421,000,000 a year in additional taxation if they assumed the burden of educating all of America's Catholic children in public schools, they do not include in their reckoning any of the social gains that would accrue from better economic standards among Catholic teachers, nor do they include an estimate of the social value of superior public education.

One reason the public knows so little about the Catholic schools is that the public agencies of the various states which are supposed to exercise some supervision over Catholic education studiously neglect this function. Most state legislatures provide their educational departments with no funds for an inspection force. The public never hears of the enforcements of standards in these Catholic schools or of the deficiencies in the system.

There is a motive in this neglect. Politically speaking, any action that might offend the Catholic Church is a "hot potato." No governor or state board of education is anxious to grasp it. All the states have some kind of legislation on the matter of educational standards because the Catholic schools have been accepted as substitutes for public education under the state compulsory-education laws, but there is little attempt to enforce standards except in four states. "State approving agencies" give perfunctory approval to almost anything that the

Catholic hierarchy cares to consider adequate. The only things that are checked carefully are attendance and the giving of certain required courses.

Blanshard, American Freedom and Catholic Power, p. 73.

89. Thus, it is sometimes said, private school children tend to do better in reading, less well in math, than do public school children. See, also, note 53, above.

90. It is true that some sects may be too scattered to be able to establish schools of their own; others may be in principle against them; and still others may be in favor of a public school system.

91. If it should be determined, however, that all children in a State are entitled to an equal share of the educational funds of that State, then it would become a nice question whether and how private school children can share in those funds. See note 159, below.

92. Pierce v. Society of Sisters, 268 U.S. 510 (1925). A related case, which I consider dubious also, is Meyer v. State of Nebraska, 262 U.S. 390 (1923). See note 150, below.

See, on Pierce, Stephen Arons, "The Separation of School and State: Pierce Reconsidered," 46 Harvard Educational Rev. 76 (1976); Richard A. Epstein, "Substantive Due Process By Any Other Name," 1973 Supreme Court Rev. 159, 168, 171; Drinan, Religion, The Courts, and Public Policy, pp. 116-127 (p. 118: "Max Lerner has argued that the Supreme Court in the Oregon decision took the first step in breaking down the separation of church and state when it 'decided that a religious group could not be compelled to send its children to the public schools, and it could run its own schools at its own expense.'"). Compare Everson v. Board of Education, 330 U.S. 1, 27 (1947) (Justice Jackson, dissenting).

93. Nor is there a clear-cut natural-right mandate for such parental rights. See, e.g., Plato, Laws 804D. Or for the right to an abortion either, for that matter! See Anastaplo, Human Being and Citizen, p. 255, n. 41. See, also, notes 85, 86, above.

94. See, on both "the right to emigrate" and on the limits of a community-benefit theory, my essays on Plato's Apology and Crito in Human Being and Citizen.

95. Wolman v. Walter, 433 U.S. 229, 256 (1977). Indeed, every opinion but Justice Stevens's, in Wolman, addresses itself to the "political controversy" criterion. See, for a review of "political divisiveness" comments, Paul W. Grace, "Church and State: The Past, Present, and Future of State Aid to Parochial Schools," 9 Southwestern Univ. L. Rev. 1211, 1219-1221 (1977). See also, Everson v. Board of Education, 330 U.S. 1, 59 (1947). Compare New York Times v. Sullivan, 376 U.S. 254, 270 (1964) ("a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). See note 150, below.

96. Justice Black, dissenting, Konigsberg v. State Bar of California, 366 U.S. 36, 64 (1961). See Blanshard, American Freedom and Catholic Power, p. 59f.

Chief Justice Burger warned, in his opinion in Meek v. Pittenger, 421 U.S. 349, 385-386 (1975):

... Certainly, there is no basis in "experience and history" to conclude that a State's attempt to provide--through the services of its own state-selected professionals--the remedial assistance necessary for all its children poses the same potential for unnecessary administrative entanglement or divisive political confrontation which concerned the Court in Lemon v. Kurtzman, 403 U.S. 602 (1971)/. Indeed, I see at least as much potential for divisive political debate in opposition to the crabbed attitude the Court shows in this case.

See note 143, below.

97. The concluding paragraphs of a talk on church and state problems in education, which I gave in 1961 to a "Human Relations Workshop" sponsored by the University of Chicago and the National Conference of Christians and Jews, indicate what should really be troubling the public about education today:

. . . I have suggested that a critical problem with education today is that it has less influence upon the reinforcement of moral values than ever before in the history of this country. This is partly due to the dominance in modern thought of what you all know and may even approve of as "relativism." The relativist approach is accentuated whenever the teacher is obliged to be "fair" to all sects in discussing with the class a subject that is at all "controversial" (i.e., important). Thus, the teacher runs the risk of either triviality or blind partisanship.

When education becomes provincial and limited in this way, it does make a difference who controls it. The better the education, the less concern need there be about who controls it. I need only remind you of something that was once extolled as "liberal education," a rigorous course of study which stressed such subjects as grammar, rhetoric, logic and mathematics. These subjects do not have implied in them (or at least do not have implied in them as much as do such studies as "history," "social science," and "human relations") the preconceptions and contentions of one sect as against another. One result of liberal education is that both the teacher and the mature student are equipped and motivated to investigate intelligently such questions as those bearing on the origin and purpose of life.

I conclude then with the suggestion that the problem of church and state with respect to the schools, to say nothing of its other manifestations, takes the acute form that it does for us partly because of what has happened to our understanding of what education is. Genuine education, adapted to the capacities of students, would not only have made the general problem of church and state less troublesome but would also have been of inestimable value in preparing us to think and talk properly about this subject.

Anastaplo, Notes on the First Amendment to the Constitution of the United States (University of Chicago doctoral dissertation, 1964), pp. 788-789. See notes 85, 86, above, notes 121, 156, below. See, also, notes 53, 57, above.

98. The Court's pronouncements on the Establishment Clause make not implausible the protest of Justice White in New York v. Cathedral Academy, 434 U.S. 125, 134-135 (1977):

Because the Court continues to misconstrue the First Amendment in a manner that discriminates against religion and is contrary to the fundamental educational needs of the country, I dissent here as I have in Lemon v. Kurtzman, 403 U.S. 602 (1971); Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); Levitt v. Committee for Public Education, 413 U.S. 472 (1973); Meek v. Pittenger, 421 U.S. 349 (1975); and Wolman v. Walter, 433 U.S. 229 (1977).

(This is his complete dissenting opinion in this case.)

See, on the Smith Act prosecutions, notes 72, 75 above.

And yet, it can be said, "However unsatisfactory its reasoning, the Supreme Court speaks as the voice of the Constitution." Opinion of Philip B. Kurland, in Constitutionality of Aid to Illinois Nonpublic Schools (Elementary/Secondary Schools Study Commission, State of Illinois, 1971), p. 8. (Mr. Kurland's opinion is drawn upon for the citations in note 33, above.) See note 72, above.

99. Justice Stewart, dissenting, Abington School District v. Schempp, 374 U.S. 203, 312 (1963).

100. See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973), Doe v. Bolton, 410 U.S. 179 (1973); Carey v. Population Services International, 431 U.S. 678 (1977). Compare Justice Black's dissent, Griswold v. Connecticut, 381 U.S. 479, 515-516 (1965).

101. Reynolds v. United States, 98 U.S. 145 (1878). See, also, Abington School District v. Schempp, 374 U.S. 203, 249, 254 (1963).

102. This element in the American character can also be exploited, as may be seen in the religious fraud case, United States v. Ballard, 322 U.S. 78 (1944), 329 U.S. 187 (1946). See Anastaplo, The Constitutionalist, pp. 532, 561.

Do not the Sunday Closing Cases, 366 U.S. 420-642 (1961) pose compulsion (or free exercise of religion) more than establishment of religion problems? Both kinds of challenges were made there. On the two lines of cases, see the text at note 79, above.

103. That credo is set forth in the text, at note 123, below. It has been repeated and cited in many cases since Everson. See, also, Hugo L. Black, A Constitutional Faith (New York: Alfred A. Knopf, 1969), p. 44.

Justice Jackson, in his Everson dissent, acknowledged that his first impression had been with the majority position. 330 U.S. 1, 18 (1947). Thus, Justice Black's judgment (as distinguished from his credo) in Everson can be seen as conceding something to that first impression? See, for my reservations about Justice Black's "establishment of religion" opinions, "Mr. Justice Black, His Generous Common Sense and the Bar Admission Cases," 9 Southwestern Univ. L. Rev. 977, 1024-1025 (1977).

104. Walz v. Tax Commission, 397 U.S. 664, 669 (1970).

105. See Wolman v. Walter, 433 U.S. 229, 252-255 (1977). See, also, page 70, above.

Also puzzling is the Court's reluctance to permit public employees, who are presumably untainted by sectarian inclinations, to enter church-sponsored schools to perform their duties as counsellors and therapists. See Wolman v. Walters, 433 U.S. 229, 244-248 (1977). If the churches sponsoring these schools want to run the "risk" of having children exposed to different views, why should the public care? See notes 25, 27, above.

See, on "entanglement" concerns, Walz v. Tax Commission, 397 U.S. 664, 674 (1970); Meek v. Pittenger, 421 U.S. 349, 371 (1975). See the text at note 125, below.

106. Abington School District v. Schempp, 374 U.S. 203, 294-295 (1963) (concurring). See Morgan, "The Establishment Clause and Sectarian Schools," 1973 Supreme Court Review 86.

107. Gunther, Cases and Materials on Constitutional Law, p. 1505. See page 26f, above.

108. See the text at notes 72-75, above.

109. Lemon v. Kurtzman, 403 U.S. 602, 651-652, 660-661 (1971).

110. Abington School District v. Schempp, 374 U.S. 203, 254-259 (1963). See William W. Crosskey, Politics and the Constitution (Chicago: Univ. Chicago Press, 1953), pp. 1057-1058, 1060-1061, 1972-1077; Anastaplo, The Constitutionalist, pp. 19, 81-84, 171-174.

111. See Dorsen et al., Political and Civil Rights in the United States, I, 1170.

112. Gunther, Cases and Materials on Constitutional Law, p. 1462.

113. Abington School District v. Schempp, 374 U.S. 203, 310 (1963) (dissenting). I will consider in the next two sections of this memorandum how the meaning of "establishment" itself has changed and how the States have had extended against them the restrictions originally intended only for the Federal Government. These changes are due less to changes in the Constitution than to shifts in the fashionable desires of intellectuals. See note 164, below.

114. Annals of Congress (The Debates and Proceedings in the Congress of the United States) (Washington: Gales and Seaton, 1834), I, 730. See Anastaplo, The Constitutionalist, pp. 30, 36, 290-293, 436, 484.

115. Ibid., p. 291. The enduring distinction between "free exercise" and "no establishment" remains in discussions today of Communism (the "catholic religion" of the Twentieth Century?). See Pierre Hassner, "Eurocommunism and Western Europe," NATO Rev., Aug. 1978; Leo Strauss, On Tyranny (New York: Free Press, 1963), p. 226.

116. See Reynolds v. United States, 98 U.S. 145, 164 (1878); Everson v. Board of Education, 330 U.S. 1, 16 (1947).

117. Dorsen et al., Political and Civil Rights in the United States, I,

1169. Consider, for example, George Washington's Farewell Address.

118. Thus, Madison had to assure his colleagues in Congress that the proposed amendment was directed against any attempt to establish a "national religion." Annals of Congress, I, 730-731. See Anastaplo, The Constitutionalist, pp. 436, 516. See note 120, below.

119. One exception may be the released-time case of McCullum v. Board of Education, 333 U.S. 203 (1948). See note 37, above.

120. Thus Madison could observe, in the course of debates in the House of Representatives on the Bill of Rights, that he "believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." Annals of Congress, I, 731. (It was on this occasion that he suggested that it be specified that no "national religion" should be established. See note 118, above.) See Anastaplo, The Constitutionalist, pp. 76-77, 484.

121. I have had occasion to make the following observations in the course of a study of Lincoln's Gettysburg Address:

We may detect these basic problems in our current church-and-state concerns: are we most explicitly concerned today about "the separation of church and state" because it is an epoch when the blending of these two by the creative statesman is much more difficult than it has ever been among us? The particular legislative measures and judicial decisions which have aroused controversy among us in recent decades may relate merely to essentially desperate skirmishes in a battle already over. One faction has a victory which it may not yet know it has won; the other has suffered a

defeat which it may be futilely trying to reverse. The victor overestimates the strength of political institutions; the vanquished underestimates the relentless skepticism of modern relativism. . . .

The problem of "church and state" may have become so acute because we are at last in an era when the relation between the state and the church is coming to reflect more than formal or legal separation. What had once been taken for granted—a seemingly inexhaustible quarry of religious sentiment independent of government control or concern—has had to be abandoned. The attempt to encourage by law what had once been produced by the community at large raises far-reaching issues of public policy and constitutional law. . . .

L. P. deAlvarez, editor, Abraham Lincoln, The Gettysburg Address and American Constitutionalism (Irving, Texas: University of Dallas Press, 1976), p. 169.

See notes 84, 85, 86, 97, above. See, also, note 115, above.

122. Rather, we are told of the "cumulative criteria" which must be taken into account in considering an "establishment" challenge. See Tilton v. Richardson, 403 U.S. 672, 678 (1971) (Chief Justice Burger). We are also asked to believe that the First Amendment has "studiously" defined what is and is not an "establishment." See Zorach v. Clauson, 343 U.S. 306, 312 (1952) (Justice Douglas).

123. Everson v. Board of Education, 330 U.S. 1, 15-16 (1947). Is not the principal concern of the Establishment Clause obscured here by the inclusion in its definition of elements more appropriate for the Free Exercise Clause? See note 103, above.

124. Abington School District v. Schempp, 374 U.S. 203, 216-217 (1963). See Anastaplo, The Constitutionalist, p. 597.

125. Walz v. Tax Commission, 397 U.S. 664, 674 (1970). I, on the other hand, see no constitutional objection to taxing church property if we should want to. See note 84, above. See, on age-old problems of taxation and religious exemptions (presented with a learned wit), Robert M. Grant, Early Christianity and Society (San Francisco: Harper & Row, 1977), p. 44f.

126. The intimate relation between religion and politics has long been recognized. See, e.g., Plato, Republic 427B: the "first" law, but last mentioned in the formation of the city, has Apollo provide what we/ See, also, Books II and III of the Republic, where the first opinions to be addressed, if a genuine community is to be developed, are with respect to the gods and to death. See, as well, Aristotle, Politics 1331a 24-31, 1335b13-17.

A modern recognition may be seen in the observation by a Roman Catholic scholar, "Although the proper concern of the spiritual society is eternal life, its liberty is such an obstacle to encroachments by the state that every tyranny is eager to suppress it." Yves Simon, The Philosophy of Democratic Government (Chicago: University of Chicago Press, 1951), p. 137. See, also, Friedrich Nietzsche, The Birth of Tragedy and The Case of Wagner (New York: Vintage Books, 1967), pp. 135-138, 142n; note 82, above, note 160, below.

It may be seen as well, in an authoritative fashion for Americans, in the rendering of Divinity by the Declaration of Independence in terms of the Separation of Powers recognized as the proper arrangement of the powers of government. See Anastaplo, "The Declaration of Independence," 9 St. Louis U. L. J. 390, 404-405 (1965).

127. See Hugo L. Black, Jr., My Father: A Remembrance (New York: Random House, 1975), pp. 175-176; Anastaplo, The Constitutionalist, pp. 497, 523, 611, 612, 765. See notes 85, 86, above.

128. Does not the community have an interest in people sharing authoritative opinions about the general order of things and about the relation of the cosmic order to morality? See notes 49, 50, 85, 86, 97, 121, above.

129. See, for Edmund Burke's characterization, Anastaplo, The Constitutionalist, p. 665. See, also, Gibbon, Decline and Fall of the Roman Empire, I, 395

("the natural propensity of the human heart towards devotion"). See, as well, Zorach v. Clauson, 343 U.S. 306, 313 (1972); note 115, above.

130. See, on absolute prohibitions in the Constitution, their uses and limitations, Anastaplo, The Constitutionalist, p. 809. See, also, Anastaplo, "Librarians and the Cause of Freedom," 60 Illinois Libraries 112, 113 ("An absolute position makes sense only if we are absolutely clear about what it is that should be absolutely protected. Such clarity requires thinking about the purposes of the protection we want to extend.").

131. Abington School District v. Schempp, 374 U.S. 203, 222 (1963). One difficulty with Justice Clark's approach is seen in that he has to speak of "all orthodoxies"--that is to say, no orthodoxy? But must he not speak of "all orthodoxies," if there is to be the orthodoxy-endorsing effect traditionally associated with establishing a religion?

It is instructive to notice how much more sensitive certain judges have been to the prospect of religious coercion than to the prospect of political coercion. Thus, Justice Stewart, dissenting, can speak of the "cruel choice" of having to "choose between /one's/ religious faith and /one's/ economic survival." Braunfeld v. Brown, 366 U.S. 599, 616 (1961). Compare his support of the majority in the Bar Admission Cases, 366 U.S. 36, 82 (1961). Similar selectivity may be seen on the part of Justices Clark and Harlan. See Anastaplo, The Constitutionalist, p. 515, n. 51, p. 535, n. 97. See, also, note 72, above, notes 160, 169, below.

See, for the roots of such sensitivity with respect to public piety, Plato, Euthyphro; Aristotle, Poetics; E. A. Goerner, Peter and Caesar: The Catholic Church and Political Authority (New York: Herder and Herder, 1965); John Locke, Epistola de Tolerantia (London: Oxford Univ. Press, 1968); Robert E. Rodes, Jr., Ecclesiastical Administration in Medieval England (Notre Dame: Univ. Notre Dame Press, 1977); Leo Strauss, Spinoza's Critique of Religion (New York: Schocken Books, 1965); Strauss, Persecution and the Art of Writing (Glencoe: Free Press, 1952). See,

also, Leo Paul deAlvarez, Laurence Berns, Eva Brann and Glen E. Thurow, Abraham Lincoln, The Gettysburg Address and American Constitutionalism (Irving: University of Dallas Press, 1976); Harry V. Jaffa, Crisis of the House Divided (Garden City: Doubleday, 1959). See, as well, notes 7, 10,¹¹⁵ 121, above, note 164, below.

132. Welsh v. United States, 398 U.S. 333, 356 (1970) (concurring).

Justice Harlan's sentiments here, it is amusing to notice, echo those in the circular the distribution of which helped send Charles T. Schenck to prison during the First World War:

The Socialist Party says that any individual or officers of the law entrusted with the administration of conscription regulations, violate the provisions of the United States Constitution, the Supreme Law of the Land, when they refuse to recognize your right to assert your opposition to the draft.

If you are conscientiously opposed to war, if you believe, in the commandment "thou shalt not kill," then that is your religion, and you shall not be prohibited from the free exercise thereof.

In exempting clergymen and members of the Society of Friends (popularly called Quakers) from active military service, the examination boards have discriminated against you.

Schenck v. United States, 249 U.S. 47 (1919); Anastaplo, The Constitutionalist, pp. 296-297.

Traditional tax exemptions have recognized a distinction between religious and secular beliefs, as have military exemptions from the earliest days of the Republic (and of the First Amendment): Both kinds of exemptions are under attack on constitutional grounds. See Gunther, Cases and Materials on Constitutional Law, pp. 1487-1488, 1527-1531; Anastaplo, The Constitutionalist, pp. 40 41; note 84, above.

133. Both the politically-minded and the apolitically-devout among us would consider as serious infringements upon the free exercise of religion such a church-state relation as that which existed in France in 1858 (at the time of the emergence at Lourdes Bernadette):

The Roman Catholic Church at that time was not very comfortably placed in spite of the fact that Napoleon III was nominally a most Christian Emperor and his Empress Eugenie so sincerely devout. In spiritual matters, of course, the Church owed no allegiance to any temporal power, but in other matters, such as the building of new Churches, the church came under the jurisdiction of the Ministry of Education and of Public Worship. Thus no new chapels or places of worship could be built or set up without the permission of the Ministry and of the proper ecclesiastical authority. The position was delicate; it was of the utmost importance that the Church should do nothing and allow nothing which could be interpreted as an attempt to overstep a legal right or to extend her power over the minds of men by encouraging superstitious devotions.

Ann Stafford, Bernadette and Lourdes (London: Hodder and Stoughton, 1967),

p. 101. One can recognize the undesirability of such a church-state arrangement without having to go so far as to say that any aid to any religious organization constitutes an impermissible establishment of religion among us.

See, also, ibid., pp. 161, 211-212.

134. In addition, it should be noticed that whatever legitimate purposes churches themselves have in sponsoring schools may be undermined by the insistence that those parts of the schools' programs supported by public funds must be conducted off the premises of those schools. This could raise, as I have suggested in another connection, a free exercise of religion problem if the principal reason there is an insistence upon off-site servicing is because of the religious interests or expectations of the sponsoring organizations. See pages 28-29, above, notes 35, 78, above.

135. It is curious, by the way, that both the "establishment of religion" problem and the "free exercise of religion" problem among us today are found primarily in the context of elementary and secondary schools. Thus, Justice Rutledge said, in his Everson dissent, that there were only two serious threats "to maintaining the complete and permanent separation of religion and civil power which the First Amendment commands:" (1) "the efforts to inject religious training or exercises and sectarian issues into the public schools," and (2) the "use

of the taxing power to support religion, religious establishments, or establishments having a religious foundation . . ." See Everson v. Board of Education, 330 U.S. 1, 44 (1947). See, also, ibid., 63. See, as well, the text at notes 79 and 102, above.

This suggests the importance of education among us, not least of the reasons being the role therein (as in few places so comprehensively today) of compulsion. But this also suggests that if so much must be made of the risk of establishment here, especially through the use of public funds "to support religion" (that is, "religion" in the form of the training supplied in schools sponsored by religious organizations), then the threats among us today of an establishment of religion must be rather trivial. See note 164, below.

136. See Gunther, Cases and Materials on Constitutional Law, p. 1462, n. 2; Dorsen et al., Political and Civil Rights in the United States, I, 1176-1177. "The First Amendment is not the only hurdle dual enrollment programs must overcome; state constitutional provisions are often more stringent, and several programs have been invalidated under the provisions." Ibid., I, 1228. (Can such State constitutional provisions be skirted by a child-benefit theory? See note 159, below.)

Sometimes, as we have seen, State constitutional provisions can even affect implementation of a Federal program. Of course, preemption by the Federal Government could well override State restrictions--but it is more prudent, if only that it is less likely to arouse local religious passions, to have recourse in such circumstances to the equivalent of the little-used "bypass" feature in the Title I programs.

The Illinois Constitution displays the more restrictive State approach to which I have referred. Thus, it is provided, in Article X, Section 3 (retaining Nineteenth Century language);

Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.

This is in addition to the provision in Article I, Section 3,

The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions, but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.

137. In the late Nineteenth and early Twentieth Centuries, we are told, "there had been eruptions of hard politics and high feelings on the issue" of public aid to church-sponsored schools. Morgan, "The Establishment Clause and Sectarian Schools," 1973 Supreme Court Review 57, 58. See, e.g., pages 31-32, above.

138. See, on the First Amendment and "history", Anastaplo, The Constitutionalist, pp. 15-23; "The American Heritage: Words and Deeds," in Human Being and Citizen.

139. I have examined this question at length, with special emphasis on the Freedom of Speech and of the Press provisions of the First Amendment, in The Constitutionalist. See note 138, above. See, in the text at note 144, below, my suggestions about the "liberty" provision in the Fourteenth Amendment, which can provide some basis for supervision of State restrictions independent of the First Amendment or any other amendment. See, also, note 144, below.

140. Justice Brennan, in Abington School District v. Schempp, 374 U.S. 203, 257 (1963). Cantwell v. Connecticut, 310 U.S. 296 (1940), is generally regarded as the first use of the Fourteenth Amendment to make applicable against the States the Religion Clauses of the First Amendment. See e.g., Schempp, 374 U.S. 203, 253-258, 310 (1963).

141. See Anastaplo, The Constitutionalist, p. 462; Malcolm P. Sharp, "Crosskey, Anastaplo and Meiklejohn on the United States Constitution," University of Chicago Law School Record, Spring 1973, pp. 3, 9. See, also, Gibbon, Decline and Fall of the Roman Empire, I, 388.

142. See Justice Brennan, Lemon v. Kurtzman, 403 U.S. 602, 647 (1971); notes 137, 138, above. "From 1876 onward all new states added to the Union were required by Congress to include in their basic laws an irrevocable ordinance guaranteeing religious freedoms in line with the principles of the First Amendment." R. Freeman Butts, The American Tradition in Religion and Education (Boston: Beacon Press, 1950), pp. 103-104.

143. Congress and the State Legislatures have been far more willing than the courts to permit public aid in some form for the education provided in church-sponsored schools. This suggests that legislators do not see this issue to be as politically divisive as do judges. Consider the following report on the 1976 national party platforms:

The national party platforms include provisions which, if effectively implemented, would be significant to private school children and their families.

The Republican plank proclaims that "diversity in education has great value," maintains that "public schools and nonpublic schools should share in education funds on a constitutionally acceptable basis," and favors "consideration of tax credits for parents making elementary and secondary school tuition payments."

The Democratic plank: "The Party also renews its commitment to the support of a constitutionally acceptable method of providing tax aid for the education of all pupils in non-segregated schools in order to insure parental freedom in choosing the best education for their children. Specifically, the Party will continue to advocate constitutionally permissible federal education legislature which provides for the equitable participation in federal programs of all low and moderate income pupils attending all the nation's schools."

Outlook (Washington, D. C.: American Council for Private Education), September, 1976, p. 1 (emphasis added; see note 149, below).

Would there continue to be whatever controversy there is now if the courts had indicated, when the issue first came before them a generation ago, that, of course, private schools can be supported with public funds wherever genuine education may happen to be provided? See note 96, above, and the text at note 164, below. See note 56, above.

One can see in the tuition tax credit debates in the current Congress various of the issues touched upon in this memorandum (e.g., note 16, above, on the issue of "all" being benefitted; note 149, below, on the question of racial integration):

Sen. Ernest F. Hollings (D., S.C.) sponsored the amendment that stripped from the bill aid to parents of nonpublic elementary and secondary pupils. He contended that such aid, because most of it would go to church-operated schools, violates the Constitution's requirement for separation of church and state.

The defeated \$250-a-year tax credit for private elementary and secondary schools was attacked by some critics who said it would promote growth of academies aimed at avoiding racial integration. "This bill has strong racial overtones," said Sen. Kaneaster Hodges (D., Ark.). "It would give aid and comfort to those trying to avoid integrated schools." To the contrary, said Sen. Daniel P. Moynihan (D., N.Y.), manager of the bill, the relief would go mainly to parents of pupils attending church-supported schools that have a long record of nondiscrimination.

Chicago Tribune, August 16, 1978, sec. 1, p. 2. Concerns have been expressed as well about the effects of such tax credits on the public schools. See, e.g., Casey Banas, "Tuition tax credit: boon or blow to education?" Chicago Tribune, April 5, 1978, sec. 3, p. 2; Chicago Sun-Times, August 22, 1978, p. 34 ("Tuition tax credits is not just another bill. It's the whole ball game, the existence of public education in this country."). See note 42, above, note 151, below.

in the Carter Administration

In any event, Department of Justice officials/ have called the tuition tax credit for church-sponsored elementary and secondary schools unconstitutional; Department

want the various consequences which do follow upon public funding--and drawing back where or when we do not? See note 38, above.

147. It does not seem to me, by the way, that a condition for the use by church-sponsored schools of public funds should be that they not "discriminate in the admission of pupils or in the hiring of teachers on the basis of . . . creed . . ." Compare Lemon v. Kurtzman, 403 U.S. 602, 672, n. 2 (1971); Wolman v. Walter, 433 U.S. 229, 234-235 (1977).

That is, there need not be directed against private discrimination on the basis of creed the public policy there has been for a century now against discrimination on the basis of race and color. See note 149, below. (Indeed, "discrimination" on the basis of creed may be a "natural" aspect of religious liberty.) See, also, notes 35, 78, above.

148. We have also noticed that, in extreme cases, the public can abolish completely the private role with respect to various of the activities I have mentioned, particularly with respect to education and welfare. That is, there is no constitutional right to have one's own charitable and educational organizations. Of course, there is a constitutional right to have churches and religious worship--but organized charity and fulltime education need not be considered intrinsic aspects of the exercise of religion. Of course, also, the highly unlikely abolition I have recognized as constitutional would have to be effected pursuant to the rule of law; it would have to respect the rights of property; it would have to compensate for any taking of property for public use; and it would have to leave open to citizens the right freely to discuss, criticize and alter what is happening.

One need mention these extreme cases only to be reminded of the extent to which public policy is involved here--the extent to which the public has

already determined that it will permit and indeed encourage the considerable private activity that we do have and rely upon in these domains.

149. Consider the recourse, at some cost to families, to racially segregated schools. Do we not want to permit some "escape hatches" from an integrated public school system for the more apprehensive segregationist families? This is not to suggest, however, that the primary attraction of church-sponsored schools is the protection they provide against racial integration. It is hardly likely, in any event, that public funds will long be permitted to be used to support segregated private schools. See notes 143, 147, above.

See, also, as indications of discussions among Roman Catholics about the level and rate of desegregation of their schools, (1) Chicago Sun-Times, February 8, 1977, p. 7 ("The superintendent of schools in the archdiocese/ also made public a detailed breakdown of this year's archdiocesan student enrollment. It showed that of the 131,299 elementary and high school students enrolled in Catholic schools in Chicago 61.5 per cent are white, 23.8 per cent are black, 12.4 per cent are Latino and 2.1 per cent Oriental. The black-white racial mix in Catholic schools here is virtually the opposite of that in the public-school system. The Chicago public schools' 524,221 students this year are 24.9 per cent white, 59.4 per cent black, 14.1 per cent Latino and 1.4 per cent Oriental. /His/ report also showed that 14.32 per cent of the archdiocese's Chicago students are non-Catholic. Among blacks in archdiocesan schools inside the city, the figure is 51.8 per cent non-Catholic."

(2) Chicago Sun-Times, September 7, 1977, p. 3 ("The superintendent of schools in the archdiocese/ said, 'We are frequently accused of taking in large numbers of public school students who are transferring in order to avoid desegregation efforts.' But he said that did not occur in South Holland, Illinois, where courts ordered desegregation a number of years ago, and is not occurring now.");

of Justice officials in the Ford Administration called it constitutional.

Christian Science Monitor, August 17, 1978, p. 1.

144. The impositions of Gobitis and Engel come to mind. See the text at notes 79 and 102, above.

See, on the yet-to-be developed implications of the Republican Form of Government guarantee in the Constitution, Anastaplo, The Constitutionalist, pp. 647-648, 820. Are certain kinds of religious arrangements or impositions inappropriate for a "Republican Form of Government"? See note 139, above.

145. It has been said by one strict separationist, in a comment on the McCullum released-time case, "The real question at issue in the debate was the kind of educational system America wanted in the twentieth century. Vashti McCollum and her supporters wanted a religiously neutral school system which would serve the children of all faiths impartially. The court agreed with them eight to one." Blanshard, "Postlude: The Battle Continues," in McCullum, One Woman's Fight, p. 204.

But to say that we want "a religiously neutral" public school system, assuming that that is possible to secure, does not also mean that we as a people must have no interest in or control over what happens in our private school systems.

146. Various concerns with respect to the Roman Catholic Church, for example, seemed much more plausible to an uninformed public a quarter century ago than they can be made to seem today.

We should not be moved merely by dire predictions of what might happen if public funding should be made available to various kinds of private organizations. Cannot we be depended upon to watch each step, making sure that we

(3) Chicago Tribune, December 1, 1977, sec. 3, p. 6 ("Declaring that 'desegregation is the American way,' the /Roman Catholic/ Morgan Park Student Council called upon the Catholic Archdiocese of Chicago . . . to join with the public schools and adopt a desegregation plan."); (4) Chicago Tribune, January 5, 1978, sec. 1, p. 3 ("Panel OKs desegregation plan; whites warn they'll leave schools"); (5) Chicago Tribune, March 29, 1978, sec. 3, p. 3 ("It's time Catholic leaders started desegregating their schools, instead of sitting on the sidelines and taking cues from the public sector, says the head of a national Catholic race-relations group /in this week's issue of the National Catholic Reporter/.").

Consider as well the column by the sometimes determinedly provocative Andrew Greeley in the Chicago Tribune, June 17, 1976, sec. 2, p. 4:

. . . /Catholic educators have not not done much to make a public case for the importance of Catholic schools as an alternative for inner-city blacks. Why they feel so strongly the need to keep this fact a secret escapes me—though they may be afraid that if their peerless and purpled leaders find that there are non-Catholics in the schools they will try to close them down. As the /current/ Psychology Today editorial observes: ". . . just as their service to black people has become most obvious, many Catholic inner-city schools are being shut down for lack of money. Still, nobody protests or helps. Black militants are suspicious of Catholic white ethnics. Liberals are busy busing. Congress worries over church-state tangles. Public educators are afraid of cost-benefit comparisons. Researchers are splitting hairs over the effect of different educational philosophies. Since black parents, like Catholic teachers, still lack a national voice, there's nobody to save the parochial schools that are now badly needed to help meet a national need." (Psychology Today, from an editorial signed by P. George Harris, June, 1976.) . . . A few weeks ago there was an announcement by the National Merit Scholarship Corp. of awards to 535 black teen-agers for college scholarships. In Chicago, four of the seven winners (two boys and two girls) went to Catholic high schools. The local Catholic school authorities should have jumped up and down and stamped their feet with glee. As far as I can determine, they haven't noticed the fact. . . .

See note 143, above, note 157, below. See, also, note 36, above.

150. Justice Black observed, "/I/here is no reason I can imagine why a State is without power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools." Epperson v. Arkansas, 393 U.S. 97, 113 (1968). This observation, which seems to be justifiable, would

properly call into question the 1923 ruling in Meyer v. State of Nebraska, 262 U.S. 390 (1923), that the Nebraska legislature could not prohibit the teaching of foreign languages to young children in the schools of that State. See Justice Holmes's dissent in Meyer, at 412. See, also, notes 92, 95, above.

May not States control also the curricula of their private schools, so long as they do not interfere with religious worship therein? Of course, there are many unofficial pressures upon private schools to conform to what happens in public schools. Thus, for example, private elementary and secondary schools are obliged to become considerably like their public counterparts in order for their graduates to be able to compete in public colleges and universities. See Blanshard, American Freedom and Catholic Power, p. 72. See, also, ibid., pp. 102-103, for the criticism forty years ago by Jerome Kerwin (a Roman Catholic scholar) of the quality of most Catholic colleges in the United States.

The public should consider what standards it wants private schools to maintain and the extent to which it wants and can secure ^{those standards} by regulation and by financial support. To insist on regulation only could very well mean that many such schools would have to close, something which should be decided on public policy grounds, not on spurious constitutional grounds (which grounds leave us unable as a community to help support what we find salutary to have).

151. Even recourse to a comprehensive voucher system or to a tuition tax credit can be regulated with a view to how much of what kind of schooling we consider best for the public interest. See notes 41, 42, 143, above.

152. It should be evident that publicly-financed welfare budgets must be providing, in an unpublicized but not necessarily improper way, substan-

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tial funds which recipients are permitted to divert to tuition for church-sponsored schools in our inner cities. Budgets may not be supposed to have any discretionary income in them; but acquiescent welfare workers must realize that some of the money they allocate to some families is going not only to support church-sponsored schools but also to support churches themselves.

153. Judicial interventions thus far have sometimes tended to throw public and private school systems together more than they normally would be, affecting how private schools have organized and conducted themselves. Do we want this? To what extent, and to what end? This has been evident in the implementation of the Title I programs.

154. Is it good for Roman Catholics, for example, to be relieved of the burdens and sacrifices of maintaining their parochial school system? Is it not a noble way of keeping down luxury? Does it not promote a sense of community from which all can benefit? See John Courtney Murray, We Hold These Truths: Catholic Reflections on the American Proposition (New York: Sheed and Ward, 1960), pp. 180-181.

155. Thus, we should consider, among other things, whether a private school system siphons out of the public schools the better students, and the students more amenable to discipline, leaving behind the worst. See note 42, above. See, also, Lew Koch, "Keeping Kids Safe From Democracy: Secondary Education for the Primary Class," Chicago Magazine, January 1975, p. 115; Iver Peterson, "Prep Schools' Rolls Are Rising Steadily," New York Times, October 19, 1975, p. 1.

Chief Justice Burger, speaking for the Court in Levitt v. Committee for Public Education, 413 U.S. 472, 482 (1973), rejected the State's claim that it should be permitted to pay for any activity "mandated" by State law. The Con-

stitutional "primary purpose or effect" inquiry, he said, "would be irrevocably frustrated if the Establishment Clause were read as permitting a State to pay for whatever it requires a private school to do." Whatever may be correct to say about the Establishment Clause, the public policy considerations I have been sketching should not mean that a State would be required to pay all that it could decide to pay.

156. I have several times referred to the effective political veto Roman Catholics may now have with respect to large-scale Federal appropriations of aid to education. See, e.g., note 1, above, and the conclusion of Appendix II, below. But a caution is in order for them, lest they fall into the error that non-Catholics have made in this century with respect to the Catholic schools: only a properly educated non-Catholic citizenry is likely to be sensible in determining public policy (including how Roman Catholics and their schools should be treated). See notes 85, 86, 97, above.

In any event, the Roman Catholic veto is likely to be reinforced by taxpayer resistance. See, e.g., Chicago Tribune, January 22, 1978, sec. 1, p. 18 ("Taxpayers cry 'enough!' via school referendums").

157. "There is nothing faulty on equal protection grounds about a true voucher scheme that excludes church-related schools." Morgan, "The Establishment Clause and Sectarian Schools," 1973 Supreme Court Review 57, 92-93. See, on "unconstitutional conditions," Gerard C. Henderson, The Position of Foreign Corporations in American Constitutional Law (Cambridge: Harvard University Press, 1918), chap. 8.

See, on voucher schemes, notes 41, 42, above; on tuition tax credits, note 143, above; on equal protection considerations, note 159, below; and on the obligation and opportunity to benefit "all," note 16, above.

158. See Dorsen et al., Political and Civil Rights in the United States, I, 1206.

159. See, for efforts to expand the use of Equal Protection in related areas, San Antonio School District v. Rodriguez, 411 U.S. 1 (1973). See, also, In re Griffiths, 413 U.S. 717 (1973). See, as well, Frank R. Strong, "Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Processes," 55 N. Car. L. Rev. 1, 104f (1976). Chief Justice Burger indicated, in Meek v. Pittenger, 421 U.S. 349, 387 (1975), that there were equal protection problems in what the Court was doing. See note 91, above.

There may indeed be serious equal protection problems if a State refused to give children in church-sponsored schools the share of Title I services prescribed by statute. But would equal protection claims add anything there to what the statute itself provides? See Wheeler v. Barrera, 417 U.S. 402 (1974); also, Appendix I, below.

Also, challenges can be expected to be mounted against State constitutional prohibitions which forbid any State aid to church-sponsored schools: See note 137, above. (Thus far, challenges have come for the most part from organizations which have been questioning public expenditures associated with church-sponsored schools, not from the schools themselves or from the parents of children in any school which has been denied public funds.) But it seems to me hardly likely that any part of the Fourteenth Amendment, let alone its Equal Protection Clause, was considered by its framers to pose any difficulty for those then-popular State constitutional prohibitions. See note 142, above. See, also, Hughes v. Kawawha City Board of Education, 174 S.E. 2d 711 (W. Va., 1970).

160. We should be reminded of the observation of an eminent Roman Catholic historian, "The point at which civil and religious liberty united,

the common root from which they derive sustenance, is the right of self-government." Lord Acton, Essays on Freedom and Power (London: Thames & Hudson, 1956), p. 114. See, also, Anastaplo, The Constitutionalist, p. 533; notes 82, 86, 126, above, notes 131, 169, below. See, as well, note 115, above.

161. Consider, in United States v. Seeger, 380 U.S. 163, 174f (1965), how far Justice Clark was willing to go in interpreting "Supreme Being" in the Universal Military Training and Service Act of 1948. Does this reflect a militant Nineteenth Century agnosticism? And consider Justice Harlan's opinion drawn upon in the text at note 132, above.

162. See, for what the older opinion was based on, Schiller's Wallenstein trilogy. It must have been inconceivable three hundred years ago that government would ever give up control of religion. It was perhaps also inconceivable that a Prince of Wales would ever suggest in public, "It seems worse than folly that Christians are still arguing about doctrinal matters which can only bring needless distress to a number of people. Surely what we should worry about is whether people are going to be atheists and whether they know what is right and what is wrong, or whether they are going to be given an awareness of the things of the spirit and of the infinite beauty of nature. These are the things that matter." Chicago Sun-Times, July 3, 1978, p. 14.

163. One commentator, after observing that the controversy over "public aid to church-related schools" seemed finally to have been "settled" by the Court (note 28, above), was cautious enough to add this warning:

One must be careful about writing off a constitutional issue with which a large and politically skillful group continues to be concerned. The door now seems to have been shut, but the future may bring arguments of an ingenuity yet undreamed of, and the shadows of personnel changes fall across all doctrinal sureties.

Morgan, "The Establishment Clause and Sectarian Schools," 1973 Supreme Court Review 57, 93.

164. Old habits are hard to break, however--and so various intellectuals, partly out of a sense of honor, can be expected to mount their resistance to what they somehow see as the only Spanish Armada available to them.

The contending groups, with respect to the issue of the use of public funds for church-sponsored schools, have been arrayed in this fashion:

Progressively, since 1945 the cost squeeze has tightened on private, and especially church-related schools. For Catholic educators, gaining substantial forms of public aid, first a matter of righting an ancient wrong, came to be perceived as a matter of ensuring future growth and finally as a matter of raw survival. Over the past half-dozen years parochial school enrollments have declined steadily, and parochial school closings are now commonplace.

During the 1960s, however, Catholic educators acquired some valuable allies as ^{the} Jewish Day School movement flourished and as certain Protestant bodies, such as the Episcopalians and the Missouri Synod Lutherans, ventured further into the school business. Throughout the period 1945 to the present, it is possible to identify fairly stable battle lines of interest groups on either side of the issue. The U.S. Catholic Conference (through its Education Division), Citizens for Educational Freedom, Agudath Israel and the National Association of Hebrew Day Schools, the National Catholic Educational Association, the Catholic League for Religious and Civil Rights, the Knights of Columbus, and the National Jewish Commission on Law and Public Affairs have all been found at one time or another to be lobbying or litigating for aid to church-related schools. This list includes only the larger, formal groups . . .

Ranged on the no-aid, or "separationist," side of the issue have been secular liberals (the American Civil Liberties Union, the NAACP, the American Association of Humanists), liberal Protestants (the National Council of Churches, the Unitarians), conservative Protestants (Americans United, the Baptist Joint Committee on Public Affairs, the Seventh-Day Adventist Religious Liberty Association), and liberal Jews (the American Jewish Congress, the Anti-Defamation League, and the American Jewish Committee). . . . In addition, there are coalitions which have formed in particular localities, the most important being the Committee for Public Education and Religious Liberty (PEARL) in the New York area. The principal partners in PEARL are the American Jewish Congress and the New York Civil Liberties Union, and its chief spokesman and legal tactician has been Leo Pfeffer.

Morgan, "The Establishment Clause and Sectarian Schools," 1973 Supreme Court Rev. 57, 59-60. See, also, Milton Himmelfarb, "Church and State: How High a Wall?" Commentary, July 1966, p. 23; Frank J. Sorauf, The Wall of Separation.

tion: The Constitutional Politics of Church and State (Princeton: Princeton University Press, 1976). See, as well, Edward S. Corwin, "The Supreme Court as National School Board," 14 Law and Contemporary Problems 3 (1949); William W. Van Alstyne, "Constitutional Separation of Church and State: The Quest for A Coherent Position," 57 Am. Pol. Sci. Rev. 865 (1963); David Lowenthal, "Van Alstyne on the Establishment of Religion: An Alternative View," 58 Am. Pol. Sci. Rev. 392 (1964); Edmond Cahn, "The 'Establishment of Religion' Puzzle," New York Univ. L. Rev. 1274 (1961); Cahn, "On Government and Prayer," 37 New York Univ. L. Rev. 981 (1962); Anastaplo, The Constitutionalist, pp. 611-612 (the quotation from Leo Strauss). Thus the argument goes, back and forth—or is it up and down?

One must sometimes wonder if "separationist" intellectuals cannot find something better to do with their crusading zeal. Thus, for example, anyone really concerned about the American way of life should do what he can to abolish or at least curb broadcast television in this country. See Anastaplo, "Self-Government and the Mass Media: A Practical Man's Guide," in Harry M. Clor, ed., The Mass Media and Modern Democracy (Chicago: Rand McNally, 1974), pp. 161, 192f. (Much of that part of my "Mass Media" article which is devoted to an argument for the abolition of television has been reprinted in Mary Pollingue, ed., Readings in American Government /Dubuque: Kendall/Hunt Publishing Co., 1978/.)

In any event, there should be among intellectuals proper respect for the spirit of the following common sensical observation by the Court in Board of Education v. Allen, 392 U.S. 236, 244 (1968):

Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in Everson and does not alone demonstrate an unconstitutional degree of support for a religious institution.

See notes 56, 85, 86, 113, 131, 135, above. See, also, notes 2, 116, above.

165. We can, in order to insure quality, deliberately support private

schools only in part, thereby putting sponsoring organizations to the test of providing most of what is necessary for continuance of their schools. Does not this tend to promote, among other things, a healthy parental interest? See notes 36, 43, 65, above, note 169, below.

166. A Chicago-area lawyer, who has an extensive school law practice, recently informed me that he routinely advises his public school board clients, "The only issue with respect to the supply of Title I services to church schools is, 'Do you go to them or do they come to you?' Either way is possible, according to the law. It is up to you to decide."

This seems to have been the principal issue in Title I litigation thus far. See Wheeler v. Barrera, 417 U.S. 402 (1974 (Appendix I, above)). The challenge to on-site delivery of services seems to be the only "cause of action" alleged in a suit which has been pending in the Southern District of New York since February 25, 1976, National Coalition for Public Education and Religious Liberty v. Mathews, Bell and Anker (Complaint, Civil Action No. 76 Civ. 888, p. 4):

Insofar as Title I of the Elementary and Secondary Education Act of 1965 authorizes the use of federal funds to support, in whole or in part, the assignment of teachers and other personnel to perform educational services within religious schools during regular school hours, it violates the First Amendment of the United States Constitution in that it constitutes a law respecting an establishment of religion.

The problem of "on-site" delivery, it seems to me, is less of a constitutional problem, under the Court's current doctrines, when all students in a jurisdiction share (as under Title I) in the public services provided. See note 16, above. That is, the on-site, off-site distinction has been developed in cases where church-sponsored schools were the principal beneficiaries of the public aid being supplied. Indeed, it now seems likely that public schools

will not be able to retain for themselves substantial Title I services if church-sponsored schools cannot get for themselves comparable services.

Church-sponsored schools have thus far gotten far less than the share allocated to them—that is to say, to their students—under the law. For what these schools get to be even roughly "comparable," on-site delivery of Title I services would seem to be required. See p. 57f, above. For this and other reasons, therefore, it is important that a full record be made in any litigation with respect to these matters. See page 6, above, note 44, above.

See, for discussions in this memorandum of the "on-site, off-site distinction," pages 8-10, 13, 19-21, 51-52, 57-59, 59-66, 69-71, 73-74, 87-88, 89, 93, 104-105, 116, 123, above. See, also, Krasicky, "Problems Emerging in ESEA," 22 Catholic Lawyer 226, 228-230 (1976). See, as well, note 156, above.

167. Besides, this act has (for better or for worse) been conscientiously fashioned to satisfy prevailing "constitutional" standards. See note 53, above.

168. See, for the "low-income families" language, note 3, above. See, also, note 4, above.

Justice Marshall said, in ^{his} Note 5 keyed to the passage from his Wolman opinion quoted in note 22, above, "To some extent, of course, any program that improves the general well-being of a student may assist his education. The distinction is ^{between} / programs that help the /church-sponsored/ school educate a student /--which programs Justice Marshall considers unconstitutional--/ and welfare programs that may have the effect of making a student more receptive, to being educated /--which programs Justice Marshall considers constitutional/." Wolman v. Walter, 433 U.S. 229, 259-260 (1977). See pp. 69-71, above.

But even the education-welfare distinction has such developments as the following to contend with (Chicago Tribune, August 5, 1978, sec. 1, p. 10):

Lawyers for the U. S. Catholic Conference have recommended that unemployment compensation taxes newly imposed on parochial schools be paid "under protest" pending further study. Amendments last year to the Federal Unemployment Tax Act brought private elementary and secondary schools into the unemployment program. Churches themselves are still excluded, according to conference attorneys. Catholic schools now will have to pay unemployment tax for each of the 114,188 lay persons they employ in the U. S. Meanwhile, conference lawyers are arguing that Catholic schools are a function of the church and should be included in the church exemption.

This kind of argument may seem to deny that there is any secular activity by these schools. But

/ for public policy purposes, the judgment to be applied to these matters is the community's, not that of religious partisans. See note 7 and page 36, above.

169. One key problem which must be reserved for another occasion is whether we really want the Federal Government involved in education in a significant form and on a large scale. See, e.g., notes 4, 43, 65, 88, 165, above. Such involvement is promoted by local taxpayers' revolts, among other developments. This is illustrated by the following report (Chicago Sun-Times, July 5, 1978, p. 24):

Federal aid to education should be increased, the head of the nation's largest teachers group said Tuesday. /The/ executive director of the National Education Assn. called in a statement for the increase so schools can cope with property tax-cutting measures like California's Proposition 13. /He/ said the success of Proposition is strong evidence that public education "will teeter on the brink of disaster" so long as it receives most of its financing from property taxes. His remarks came at the NEA convention in Dallas.

See, in support of massive Federal aid to education, Harry V. Jaffa, "The Case for a Stronger National Government," in Robert A. Goldwin, ed., A Nation of States: Essays on the American Federal System (Chicago: Rand McNally & Co., 1963). Compare Anastaplo, The Constitutionalist, pp. 585, 608-609, 664-665,

747: James J. Kilpatrick warns, in his column in the Milwaukee Journal of August 1, 1978, pt. 1, p. 9,

. . . No gifts of prophecy are required to see the trends that lie ahead. As resistance to high local taxes grows stronger, the financing of public education will drift steadily toward the federal treasury. At the present moment, "federal funds" provide about 8.3% of the total spent on public schooling. The National Educational Association is pushing toward the day when federal taxes will cover one-third of the cost. Federal controls already exert heavy and often decisive pressure on local decisions. The controls will get tougher and tighter as the equalizers lobby for identical per pupil expenditures everywhere.

Once upon a time, education was wholly the responsibility of the states and the localities. The Senate bill /creating a new Department of Education/ contains one perfunctory sentence giving lip service to that tradition. But the effect of the pending bill would be to accelerate the process of erosion, and to vest ever expanding power in Washington. He who pays the piper calls the tune. . . .

(The tendency toward centralized control can be ^{partially} countered by leaving it completely a matter of "local option" what textbooks are used in schools. Indeed, on these and on other grounds, I consider it a dubious practice to insist that the textbooks supplied by a State to church-sponsored schools should be only the ones selected by or for the public schools of that State.)

Curiously enough, the "equalizing" tendency within States (as evident in Serrano v. Priest, 5 Cal.2d 584, 96 Cal. Repr. 601, 487 P.2d 1241 /1971/) has been (temporarily?) set back by the ruling in a Federal case (even though that ruling does not, on its terms, preclude a statewide equalizing effort), San Antonio School District v. Rodriguez, 411 U.S. 1 (1973) (note 159, above). See Robert Lindsey, "New Battles Over School Budgets," New York Times Magazine, September 18, 1977, p. 12. (This, too, points up the stultifying effect the Federal Government can have, even if inadvertently, on State and local developments.) See, on the salutary role of States' rights in the American Union, Anastaplo, The Constitutionalist, chap. 7. (My argument in that chapter is reprinted, in part, in the American Government reader cited in note 164, above.)

It may well be, by the way, that the passions formerly expended on religious liberty concerns (see note 2, above) are now partially diverted to concerns about "privacy." See Anastaplo, "The Public Interest in Privacy: On Becoming and Being Human," 26 DePaul L. Rev. 767 (1977). The Final Report of the Privacy Commission on which I served (referred to at pages 76, 81, above) may be obtained by writing to the Commission Chairman, Mr. Bernard Weisberg, Room 1500, 120 South LaSalle Street, Chicago, Illinois 60603.

(The report includes a section on a student records privacy act which we prepared. See P.A. 79-1108, Illinois Laws; S.H.A. ch. 122, sec. 50-1 et seq.)

In any event, it can be salutary to be reminded that blatantly coercive governmental action with respect to religious matters (or with respect to properly private matters) has always been resented by spirited Americans. Thus, it is noticed in Abington School District v. Schempp, 374 U.S. 203, 223 (1963), "The distinction between the two religious clauses of the First Amendment is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." See pages 27-28, 34, 35, above; also, notes 115, 131, above.

See, as illustrative of such coercion and of the foolishness to which it can lead, Central Military Track Railroad Co. v. Rockafellow, 17 Ill. 541 (1856). Compare Hronek v. The People, 134 Ill. 139, 149-153, 24 N.E. 861, 864-865 (1890); also, Justice Black's dissenting opinion, The Bar Admission Cases, 366 U.S. 36, 103, n. 4 (1961).

INDEX OF CASES, SUPREME COURT JUSTICES AND OTHER SOURCES

References to the Constitution of the United States, to the First Amendment, and to Title I of the Elementary and Secondary Education Act of 1965 are too numerous to record.

Cases are listed in this index according to the party by which they are apt to be known, such as,

- (1) Barnette, West Virginia State Board of Education v. (instead of, West Virginia Board of Education v. Barnette);
- (2) Reynolds, United States v. (instead of, United States v. Reynolds);
- (3) Rockafellow, Central Military Track Railroad Co. v. (instead of, Central Military Track Railroad Co. v. Rockafellow).

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Appendix B/

Title I Services to Native American Children on Indian
Reservations

Stan Boynton
New School for Social Research
1979

The Role of Private, Public and Federal Schools on Indian Reservations.

The non-pulbic school is one of three types of schools providing education to Indian students. The others are the Bureau of Indain Affairs (BIA) day schools and boarding schools, and the public schools. The roles and obligations of each of the three are defined legally and historically.

Responsibility of BIA to Indian Students.

The legal obligation of the BIA to Indian students is ill-defined. The BIA is not obligated to provide schools or schooling under present law. But the BIA has traditionally provided the benefit, and the historical pattern confers its obligations. In the 19th century only the BIA and the mission schools provided education to Indian students. Now approximately 25% of all Indian students attend BIA schools, and the BIA is examining the question of whether it should withdraw entirely from its role as educator. It will probably continue to provide education for three reasons. First, it is needed.. It is the only agency which can provide education to those Indian students who are geographically isolated or have particular social problems which prevent them from going to public school. Second, there is a political and legal basis for arguing

the benefit cannot be cut. In passing the Self-determination Act of 1975, Congress assured tribes that the federal commitment would not be lessened as tribes began to take over BIA responsibilities. And third, there is a substantial political demand for the service. Numerous tribes have contended that education and social services are part of the BIA's trust responsibility. Local school districts can be expected to oppose a cut in the BIA service, since the education obligation would fall to them.

Currently, the BIA does not try to serve all Indian students. Its criteria for selection is dual. An Indian student must be a member of a federally recognized tribe and must be isolated from the public school bus route.

Responsibility of Public School System to Indian Students.

The public school has the obligation to serve all the students in its district and every geographic area falls within some public school district. It was not until the 1950's however, that a majority of Indian students began attending public schools. In regions with high concentrations of Indian communities, this influx of Indian students placed a strain on the local district's capacity to deliver educational services. Districts were faced with limited local tax bases because of the presence of the reservations, which could not be taxed, high concentrations of Indian students, and in some cases an

under-allocation of state aid (per pupil allotment) funds.

Recognizing the constraints upon these districts, the federal government passed legislation intended to assist local school districts with Indian students: the Johnson O'Mally Act, Public Law 81-874, the Indian Education Act, and Public Law 81-815. The Johnson O'Mally Act (JOA), now being phased out, provided funds to help fill the gap between state aid and tax funds. Public Law 81-874 (Special Impact Aid), provided assistance to those school districts impacted by federal installations. PL 81-815 was similar except that it provided funds for capital improvement. The Indian Education Act provides funds for new and relevant Indian education programs.

Role of the Private School on Indian Reservations.

The third institution providing education to Indian students is the non-public school. Frequently it is a parochial school, originally perhaps a mission. The parochial schools play a very important role on the Indian reservation. It may be the only alternative source of educational services for an Indian family. Whereas in urbanized areas, a family has the option of moving from one community to another in search of higher quality education, the reservation Indian family does not. The Indian family may be tied to a particular part of the

reservation that has been the home of the family for generations.

On the reservations, with few exceptions, parochial schools have the reputation of providing higher quality instruction, and a curriculum more adopted and responsive to the Indian tribal culture. On the New Mexico-Arizona Navaho Reservation, the nation's largest Indian reservation, many of the present day leaders are graduates of a particular mission school near Farmington, N.M. And an unusual number of tribal leaders decide to send their own children to parochial schools. The BIA schools do not offer comparable programs. Of the public schools, a few offer some excellent programs, but most are of indifferent quality. The reservation parochial schools have the reputation of being the training ground for tribal leaders.

Impressionistically speaking, we observed in the schools visited in this study that the parochial schools seemed to have greater success with Indian cultural awareness classes than did either the BIA or public schools. Native language was taught and local traditional tribal leaders participated in classroom activities.

Relationship of the BIA and OE under Title I.

Title I services are delivered to children in all three types of schools, non-public, BIA and the public school. The BIA enjoys a special relationship with the

Office of Education for its Title I allocation. According to the law, the BIA, Guam, the Virgin Islands, and the trust territories receive 1% of the total Title I grants (excluding funding for state administration, aid to the handicapped, migrants and neglected and delinquent children). In the last few years, the 1% has not been sufficient to satisfy the 1973 hold-harmless provision of the law. Consequently, the BIA and these other territories have been receiving the same amount they received in 1973. In Fiscal Year 1978, the 1% will be greater than the hold-harmless and a new memo of understanding is being prepared which will define the allocation of the 1% among these groups. Under almost all the options, the BIA share will increase from its current \$17,953,000 to approximately \$19,000,000.

The BIA makes available Title I services for all children enrolled in BIA responsible schools. BIA responsible schools are those schools funded entirely by the BIA (BIA schools), those schools contracted by the BIA to an Indian tribe (contract schools), any school in an unorganized school district (St. John's near Phoenix is the only one) or by any BIA domiciled students attending an out-of-state public school.

The BIA found that it could not develop a formula for the distribution of funds among its administrative areas based on need. Therefore the money is allocated to the

areas on a strictly per capita basis according to the October 31 enrollment in the BIA responsible schools. Poverty criteria is not employed, but virtually all BIA-responsible territory would qualify as Title I Target Areas under the criteria to be applied to substantially low-income areas. The area office has some discretion in the allocation of these funds among the schools within the area. It may distribute funds in one of two ways. The area may allocate funds to schools on a strictly per capita basis or it may choose to concentrate on certain areas, principally those that are geographically isolated. If the area office chooses to implement the latter alternative, it must submit the criteria it used to develop the plan to the Central Office for review. None of the BIA areas studied followed the latter approach.

Generally the area office distributes funds to the schools, which in the BIA are each local education agencies (LEA's), on a per capita basis. All students attending the LEA are eligible and the school must serve those most educationally deprived. If the LEA chooses it may concentrate services on a few students rather than trying to serve all students. In either case the Parent Advisory Council (PAC) must approve the plan.

In contrast to the public school system there are no selected attendance or target areas within the school

district. Nor are only certain students in the school eligible. All schools may receive Title I funds and all students are eligible for services.

Effect of BIA Presence on Public Schools.

The presence of the federal BIA schools is a significant advantage to the public school system. The BIA schools generally serve students from isolated regions, relieving an already over-taxed school district of that responsibility. And while the LEA's do not get state aid for the children enrolled in the BIA schools, there is less demand on the total state aid fund, and this might aid the LEA.

But BIA schools are a special benefit to the LEA's Title I program because of the Title I distribution formula. The school districts are allocated Title I funds from the state based on census data from the Office of Education (currently the population aged 5-17 in families with annual income under \$4,000 plus $\frac{2}{3}$ the number of federally dependent children in the district). This count includes all children within the category, regardless of what school they attend, since Title I is basically a student-aid program. In a school district with a high concentration of Indian children, a significant portion of the poor children may attend federal schools. This means that the students are double counted for Title I.

once as part of a per-capita distribution among BIA schools and again when state offices of education distribute funds among schools based on the census. The public school district with Indian children gains under the double counting. It receives Title I dollars for children for which the district is responsible but for whom it does not have to provide services since the children receive BIA Title I funds.

But the presence of Indian children causes some disadvantages. Income statistics for the families are unreliable, and census figures suspect because of the great isolation of the families in rural areas. And a disproportionately small number of those eligible for AFDC are enrolled, so that the state and the district do not receive as much as they should of the federal aid.

Equity of Title I Services among Private, Public and Federal Schools.

Many Indian children attend private schools. We are charged with determining the degree to which these students receive services compared to those received by students in the federal and public schools. The reader should bear in mind that for purposes of Title I two overlapping systems provide services in regions of the country in which there are concentrations of Indian students. One system is the public school system which must serve its own children and those attending private schools. The other

is the federal BIA system, which serves only its own children. Regardless of which type school the Indian student attends, the students should have an equal chance for Title I services. The opportunity to receive comparable services is determined by a number of factors.

Description of Cases.

As part of the evaluation of Title I services to Indian students in non-public schools, the evaluators chose to visit sections of the country with large concentrations of Indian students. In these areas Indian students attended public, non-public and Federal BIA schools. The evaluator visited all three types of schools in each region and then attempted to determine the degree to which equitable services are provided to Indian students in each type. The public school districts were Gallup-McKinley County, New Mexico, Window-Rock Arizona, and Shannon County, South Dakota. The BIA cases were the Navajo Area and the Pine Ridge Agency.

DESCRIPTION OF PUBLIC SCHOOL DISTRICTS

Gallup-McKinley County School District

McKinley County is located in west-central New Mexico adjacent to the Arizona border. It is one of the largest counties and school districts in New Mexico, covering the Zuni Indian Reservation, the city of Gallup and portions of the Navajo Reservation. The district has 26 public schools and 5 private schools. Of these 31 schools, 12 are located in Gallup and 20 are located in the "outlying" areas, some of which are 60 miles away. These schools served in 1976-77 close to 15,000 students, 60% of which were low-income, and the majority of which were Indian. The student bodies of the schools in the outlying areas are almost entirely Indian, and the student bodies of the city schools were about one-half Indian, depending on its location in the city. Despite the large Indian student population, there are no Indians on the school board nor do Indians occupy any significant position in the administration. One consequence of the lack of Indian representation may be the current effort in the northern half of the school district centering around Tohatchi to become a separate school district.

According to HEW regulations, Gallup-McKinley County School district receives a Title I allocation for all school age children in the district regardless of

where they attend school. Some 3600 school go children attend federal schools run by the Bureau of Indian Affairs. These children are included in the count that determines the Gallup-McKinley County Title I allocation.

Gallup-McKinley County school district B also known within the state as having a low local contribution to the public school effort. The state department of education takes half of that local contribution and divides it into the Title I allocation figure to determine how many Title I students the district should serve. The low local contribution and the _____ allocation means Gallup-McKinley County may serve a larger number of Title I students than other New Mexico School districts of a comparable size. Ironically, the school district reports that it was unable to expend its entire Title I allocation and cited the limitation on the number of students as the reason.

Window Rock School District

Window Rock School District is located in northeastern Arizona near the New Mexico border. Although there are only six schools in the district--two of which are parochial--all are located within ten miles of each other. The students come from considerable distances to attend, and many travel 45 minutes or more by bus over unimproved road to attend. Approximately 3300 students are enrolled in the schools, 95% of which are Indian and 20% of which attend parochial schools.

Window Rock school District has been troubled by uncertain and limited financial resources. First, the district has a limited local tax base on which it may draw, because the reservation land is held in trust by the Federal government and not subject to tax. Second, for several years the state department of education provided no state aid to the district for the high school and now gives the district only elementary school aid for the high school. Thirdly, the district is eligible for several federal aid programs, like Johnson-O'Mally, Federal Impact Aid and the Indian Education Act, but efforts to obtain consistent aid from them have proved frustrating. Consequently the district has been faced with limited local support, insufficient state support, and irregular federal support.

The school district has an entirely Navajo school board and Indian administrators in key positions. For the moment the school district is concerned with survival.

Shannon County School District

Shannon County is located southeast of Rapid City in the southwest corner of the state of South Dakota. It is either half or all the Pine Ridge Indian Reservation depending on the legal interpretation of the reservation. There are four public schools and three parochial schools. None of the public schools offer a high school education, and only one of the parochial schools

does. There are 3100 school age students in the district, almost all of which are Oglala Sioux Indians. Only 20% of the students attend the public schools. The majority, (55%) attend BIA schools and 24% attend mission schools.

Despite the fact that the population at large and the majority of the student body is Indian, there are no Indian members of the school board, nor do Indians occupy any of the key administrative positions in the school district.

Because there is no public high school in the district, the district must pay tuition at a rate established by the state for any student who has to leave his or her district to attend.

Treatment of Private Schools--Common Points

In all three public school districts in which there were non-public schools, several common factors were apparent. Most importantly, in all districts a significant number of Indian students attended the non-public school. In no case was it less than 20% and in one case more students attended the non-public schools than the public schools. Therefore how non-public schools were treated would have a great deal to say about the degree to which Indian students benefitted from Title I.

Neither the non-public schools nor the school districts were sophisticated operations. Both operated on a small scale. Both seemed to lack familiarity with the

law and with the regulations. Consequently the non-public schools seemed ignorant of the state to them under Title I.

Access to Information

Access to clear, accurate information seemed to be a recurring problem. One non-public school which was not participating was not sure what the Title I program was nor why it had decided not to participate. Others misunderstood certain aspects of the Title I program, like PAC involvement. Lack of access to information led to limited participation in the decision-making process.

Private Schools, Points for Consideration

Without exception the private school Title I coordinators did not know what an equitable allocation to their school was. They generally did not know how their allocation had been established. And they seemed unaware that an allocation equal to a comparable public school was their right. Usually they were grateful that the public school district had offered to help them at all.

In general the non-public schools were under-allocated by almost any criteria. Most of the time that criteria was not clear and in one case the district Title I Coordinator admitted that it did not exist.

The non-public schools seemed to depend on the good will of the public school district to obtain their fair share of services. The non-public schools had little

leverage to obtain greater services. Their superintendents and principals were not tied into the public school networks through which they might apply pressure. Whatever leverage the non-public school had was through the PAC. If the district had no PAC or if it had a PAC and there was no non-public school involvement, there was no non-public school input.

Target Aid

Target areas were established by using an AFDC poverty level or school lunch count. Those schools in which 30% or more of the student body qualified for free lunch were designated target area schools. In 11 districts, all the schools, public and non-public, urban and rural, qualified as target area schools. This is probably because all schools had a high concentration of Indians, and the Indians are likely to be poor.

Selection and Supervision of Staff

There was good cooperation between the public school district and the non-public schools in the supervision of Title I teachers and aides in non-public schools. The nonpublic school supervised the Title I staff as he did all his employees. The school district Title I coordinator supervised their work as public school employees. The private school usually had a strong influence in the selection of the Title I personnel working in their

schools. In some cases they were able to select the personnel, subject to concurrence by the district office.

PAC

The non-public schools in Indian communities had active PAC's if the PAC existed. Often the school was unaware that it was supposed to encourage parent participation in Title I at the school or district level. This was usually due to failure on the part of the district Title I coordinator to communicate PAC regulation. The private schools seemed to see no problem in establishing PAC's, pointing to successful parent participation elsewhere in school boards and committees. Furthermore, PAC district participation was essential to the non-public school. It was through the PAC that the needs assessment and program allocations took place. It was really the only mechanism the non-public schools had to become informed and influence events.

The attention paid by the state to non-public school participation was the last point common to all the districts visited. The States asked to see whether the districts had contacted the non-public schools for participation. Usually a sign-off sheet for non-public schools administrators accompanied the districts Title I application. The sign-off sheet indicated the non-public schools had been contacted about the program. However, there was

no evidence of the state education agency pressuring the district to promote non-public school participation.

Even the state evaluators paid little attention to the question of equity between public and non-public schools. In fact, one state evaluator emphasized that the district be particularly concerned that the non-public school not use its Title I services to supplant local services. Part of the reason for the state's not pressuring the district is probably due to the informal relationship between the district and the State. The district seems to operate pretty independently. In part this may be due to the nature of rural states. In part it may be due to the states limited staff.

Participation in Needs Assessments

In other areas treatment of non-public schools was not similar in different districts. The participation by non-public schools in district-wide needs assessment was one of those areas. In two districts, the non-public school officials were not even aware that a needs assessment had been done or that they could participate. There again the PAC seemed to be the key. Where needs assessments were done, they were conducted through the PAO. Where non-public schools were involved in the needs assessment, they were either not involved in the PAC or there was no active PAC.

Definition of Eligible Students

All districts tested their students. But there seemed to be no two methods of utilizing the results of the tests. The most frequently used method was to establish a grade level cut-off. Those students who tested one year below grade level on the national average were eligible. The second method was to use percentiles. Those students in the 25th percentile or lower were eligible. Neither system served to affect the non-public schools. Under either method more students than could be served were eligible.

Participation in Program Planning

In two of the districts, the non-public schools were not involved at all in the process of defining the Title I program. However, it is not clear that the public schools were involved to a much greater degree. In one case, the non-public school was simply sent teacher aides and told they were to assist the teaching of English and math. In most cases the non-public school administrators were not dissatisfied with the current Title I program. They were surprised, however, to learn that they could be involved in the process to help define it.

Delivery of Services

Services in all the non-public schools were delivered on-site. Usually the services delivered were

language arts, English and math. Several non-public school administrators and district Title I coordinators stressed the importance of working on these subjects with Indian children in the early grades. Kindergarten was a frequent choice for a Title I language arts program because many Indian children enter school with out sufficient language skills.

The personnel used to deliver the services varied by district. One district provided only aides in the classrooms of the lower grades. Another district provided services in the classrooms and in laboratories separate from the classroom. The labs were usually staffed with a specialist and an aide.

Evaluation

All districts were evaluated periodically by the state. The form of the evaluation varied. In one case, the evaluation was essentially an audit, and little of it was done on-site. The non-public school administrator in that district could not remember the state ever evaluating the Title I program. In other cases the evaluations were more thorough. One state encouraged the district to call in an outside firm to conduct an independent evaluation. This evaluation tended to stress more of the qualitative aspects of the program and seemed to prove more beneficial to district Title I administrators in their efforts to improve their program.

Particular Problems

The disparity between the start of the Title I program year and the start of the school year posed a problem for one school district. Its school year began in August and the Title I program began in October. In order to operate a Title I program during the August to October period, the school district was forced to hold over money from one school year to begin the next one.

One problem that seemed to be particularly prevalent among non-public schools was the lack of classroom space in which to provide the Title I program. In several instances, the private school had a significantly less expensive program than comparable public schools and lack of classroom space seemed to be one of the reasons. In no case did the district use Title I funds to acquire more space.

Conclusion

A significant number of Indian students attend non-public schools. Consequently, how non-public schools are treated under Title I will say a great deal about how Indians students are treated.

The non-public schools with Indian students were not sophisticated operations. They were generally parochial schools, originally part of a mission to the Indians, living in the area. The non-public school administrators demonstrated a lack of familiarity with the

Title I legislation, the regulations and the obligation of the State to private schools.

The schools seemed to depend on the good will of the public school districts to assure that they received an equitable share of the Title I services. The non-public schools were ignorant of what constituted a just allocation of services to their students. The only mechanism to pressure the school district was the PAC--if it existed. Usually it did not exist, and the non-public schools remained uninformed and without leverage.

On the positive side, all non-public schools, like the public schools, were target schools. Nevertheless, they were underallocated for Title I services. Most districts lacked a suitable criteria for the allocation of services. Often a lack of classroom space further prevented non-public schools from offering a larger program.

Parent Advisory Councils participation in the non-public schools was usually non-existent. Most administrators insisted that the school districts had not _____ the non-public school parents to participate. Where non-public school parents did participate, the school benefitted by becoming better informed and better able to pressure for more services.

Without a doubt Title I has had an impact on the non-public schools. It has improved the quality of their scholastic program by identifying and improving the basic skills of the most deprived students.

Title I and other federal funds are a significant portion of the non-public schools' budgets. The Title I and other Federal programs are now seen as essential portions of the curriculum; portions the school could now not do without.

Thus dependence on Federal aid has served to reduce the independence of non-public schools. The schools are required to follow certain guidelines and account for the Federal funds to public sector authorities in a fashion that they hadn't had to do previously. The Title I program became a fixed part of the curriculum, reducing the administrators scheduling flexibility. It's doubtful that most non-public schools could afford to give it up. The resulting strain on the regular program would be too great.

DESCRIPTION OF BIA CASES

The Navajo Area of the BIA

The Bureau of Indian Affairs (BIA) maintains 57 federal schools for Indian students in the Navajo Area. The Navajo Area takes in most of the Navajo reservation, an area about the size of the state of Virginia, straddling the three states of Utah, Arizona and New Mexico. Student populations in the schools range from 24 to 1000 students. Students are either Navajo or Hopi, though the vast majority are Navajo. About 10-15% of the schools are day schools. The remainder are boarding or boarding-day schools. The schools range from K-7 to K-12. Three of the schools are run by local community boards under contract to the BIA. These contract schools generally _____ in those aspects of Title I which call for community participation, _____ assessment, PAC, internal evaluator.

In general the quality of education in the federal schools is inferior to the education received by students attending parochial or public schools. At least, a high school graduate of a BIA boarding school enjoys far less prestige than his other counterpart in the public school. And BIA high school graduates are far less likely to attend and do well in college than public school Indian students.¹

¹ P. 522, Rosenfeld, _____, ??Indian Schools and Community Control

BIA school administration is characterized by an entangled and rigid bureaucracy. Within the Navajo area there are five agencies. Both the agencies and the area offices have staff of specialists for education. Line authority runs through the agency superintendent, to the area director, to the commissioner of Indian Affairs, and alternately to the Secretary of the Interior. Problems that for a public school system might be solved at the school or district office are considered in the BIA by personnel far removed from the problem. Thus consideration might take place only after a complicated interchange of memoranda among employees who tend to operate "by the book."

Pine Ridge Agency of the BIA

Pine Ridge Agency of the BIA is located in Southwestern South Dakota about 60 miles from Rapid City. It is about 100 miles by 50 miles square. The BIA operates seven schools within Pine Ridge, one of which is a community controlled contract school and one of which is operated cooperatively with the Shannon County Public Schools. Two of the schools are K-10 and the remainder are K-8 or K-9. All the 1800 students attending the schools are Indian, most of whom are Oglala Sioux.

Tribal or community take-over of the schools has progressed further in Pine Ridge than on most reservations. In addition to the community controlled school at

Loneman, the United School Board, a federation of all local school boards, operated the Title I program. Although the Title I contract between the BIA and the United School Board has been characterized by disputes between the two parties, it is nevertheless a significant step toward Indian community control.

Common Points among BIA Schools

The Bureau of Indian Affairs school system is very large. It serves at least as many students as the public schools in the Navajo and Pine Ridge regions. In the case of the Navajo Area, the BIA administers schools over a large region that encompasses five public school districts. In order to administer such a large educational operation, the BIA has had to assemble a large and complex bureaucracy.

Problems with Title I Bureaucracy

Several instances pointed out problems caused by the complexity of the BIA Title I bureaucracy. On several occasions local Title I coordinators complained about dissatisfactory policies they thought the Central Office had established. For each case the Title I Central Office explained that the policy in question had not been established at the Central Office. The Central Office explained that it leaves a great deal of discretion to the area offices. Area office personnel, in turn, reported

that most policy was made centrally and reviewed by the area offices. Examples of the policy misunderstandings were the following: limitations on budget transfers, selection of a reading aptitude test, use of test results as a measure of program quality, determination not to pay per diem to PAC members, consideration of local schools, as local education agencies (LEA's), and establishment of a deadline after which no budget revisions could take place. In each case there existed poor communications of information among the three or four levels of BIA Title I bureaucracy.

Problems in Hiring Staff

In the BIA the Title I staff are not civil servants. They are considered temporary employees and they must be hired yearly. The temporary nature of their employment hinders the efforts of Title I Coordinators to recruit and maintain quality Title I instructors. Sometimes other factors serve to further complicate the process. In a case in which the BIA contracts the Title I program to a local school board, negotiations delayed the signing of the contract until more than a month into the school year. Only after the contract was signed could the schools begin to hire Title I teachers and aides.

All of this delay serves to reduce the effectiveness of the Title I program. The staff at one BIA school estimated that they had taught Title I students far less

than the nine months they were supposed to teach. they cited the late beginnings, Christmas vacation, teacher planning days, and several blizzards as factors that reduced the Title I school year in that school to 5 1/2 months. A shortened and irregular school year influences the students' progress.

Target Areas

One major difference between the BIA and the public school Title I program is that the BIA does not establish target areas. All BIA schools receive Title I funds based on a per capita count. There are no target areas within the BIA areas.

Needs Assessment

Almost none of the BIA schools conducted needs assessments to determine what services to offer under Title I. Significantly, the lone exception was a community controlled contract school. This contract school was able to conduct its needs assessment through its school board. The regular BIA schools did not seem to have active school boards through which they could conduct their needs assessments.

Determination of Eligible Students

All schools tested the students with a reading aptitude test to determine deprivation among students. Those students one year or more behind grade level were

considered eligible. Almost universally teachers complained that no existing standardized test could accurately measure the reading proficiency of Indian children. All existing tests contained words like "apartment" or "igloo" which were foreign concepts to reservation Indian children. Furthermore, BIA teachers did not seem to have as much freedom as public school teachers to select the most appropriate aptitude test..

Selection of Participating Students

Participating students were selected on the basis of test scores and teacher recommendation. Usually the participating students were those students with the lowest test scores. In general, a larger portion of BIA school students were eligible than the portion in the public or private schools. Furthermore the BIA students were further below grade level than students in either public or private schools. The BIA Title I staff attributed this to two factors. First, BIA students tend to come from remote areas of the reservation, from non-English speaking households, and from households less likely to emphasize the value of formal education. Secondly, the BIA regular program may not be as strong as the regular programs in the public and private schools. Consequently, more of the students in BIA schools are further below grade level.

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Planning and Definition of Program

Most BIA Title I teachers reported that they had not been involved in the planning of the Title I program. The area office personnel reported that they had listened to suggestions from the school personnel and then they had made the final determinations. Indeed the area offices were able to point to a long and varied list of services offered at different schools under Title I.

Common among all the programs were classes in English, math, and language development. All these services were provided on-site in a laboratory setting. A few specialized services like special education or vision or speech assistance which are provided regionally. Most of the services were staffed by specialists assisted by teacher aides.

Supervision

The Title I staff in the BIA schools were supervised by the local principals. The Title I program was considered part of the regular BIA program. The only exception was the situation where the BIA contract the Title I to the reservation board. In that case the Title I personnel were occasionally faced with problems resulting from dual supervision. One coordinator recalled an instance in which both the school principal and the school board administrator directed her to attend meetings. A

controversy arose and the Title I coordinator was caught in the middle.

Area Services to Local Schools

None of the local BIA schools reported receiving programmatic assistance from the BIA area office. On the contrary the entire relationship between the local schools and the area office was related to accountability. This emphasis on accountability took many forms. The training and technical assistance provided by the area office was directed at helping the local schools, yet the application in acceptable form. During the school year the area office provided limited assistance in program planning, curriculum development or program evaluation. The visits of area office monitors were for the purpose of determining compliance with record-keeping regulations and reviewing the results of test scores. Test scores were the basis for evaluating programs and identifying successful ones. Almost without exception BIA Title I teachers complained about the inappropriateness of evaluating a program with the results of tests the teachers felt did not accurately measure the students' progress.

One school thought that the BIA had become too preoccupied with documentation of results in its effort to demonstrate accountability. Once the school had requested

permission to take students on a field trip into predominantly English-speaking urban areas. The BIA area office denied the school permission stating that the benefit of such a trip was not measureable.

Other schools complained that the BIA was so concerned about accountability that their budgeting flexibility was limited. It certainly appeared that BIA schools had much less flexibility with their program than either the public or private schools. In a case in which the Title I program was contracted to the tribal school board, the area office set December 5 as the last date in which revisions could be made in the contract. Since the contract had been signed in early October, that left only two months for program or budget revisions.

Furthermore, as part of its effort to be accountable, the BIA requires all schools to be very specific in the budget portion of the program proposed. All supply items must be identified by brand name and price. The area office does not approve purchase orders unless the description and price of the supply match the budget for the program proposed.

Parent Advisory Committees

BIA schools had varied success in promoting Title I Parent Advisory Committees. Generally the parent involvement was poor. This may be due in part to the long

history of excluding Indian parents from participating in the BIA's policy-making process. In one exceptional case a community controlled school was established through the efforts of an active Title I parent advisory committee. In general, community controlled BIA schools are the exception to PAC apathy. Among them the Title I PAC process is part of the entire federal program review process.

Several factors seemed to prevent the Title I Parent Councils from being as effective as they should. The first factor was financial. The BIA allowed its schools to pay per diem and reimburse travel expenses. In most cases only expenses were reimbursed. No per diem or loss of wages were paid. This policy had the effect of discouraging PAC membership among certain poor parents and limiting membership to those parents who live near the school and have regular employment. This was a particular problem for those off-reservation schools where parents may live 500 miles away.

The second factor was the limited power of the PAC. This limitation is partly due to federal regulation and partly due to the community's perception of the parent council. The third factor was competition for membership. In many Indian communities the PAC was in competition for membership with other parent committees or boards which were more prestigious. Usually the more prestigious

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boards, like the Indian Health Board, had a greater membership and offered greater financial remuneration.

Conclusion

The Title I program in the BIA schools is limited in its effectiveness by the nature of the BIA schools. It is part of an entangled bureaucracy. It is subject to unreasonable measures to document accountability. It operates in a system that traditionally has discouraged parent or community involvement. The teachers and coordinators work on a year-to-year basis with no real promise of security. The ultimate victims are the students. No matter how good the Title I programs are, and most were quite good, factors external to the classes limited their effectiveness.